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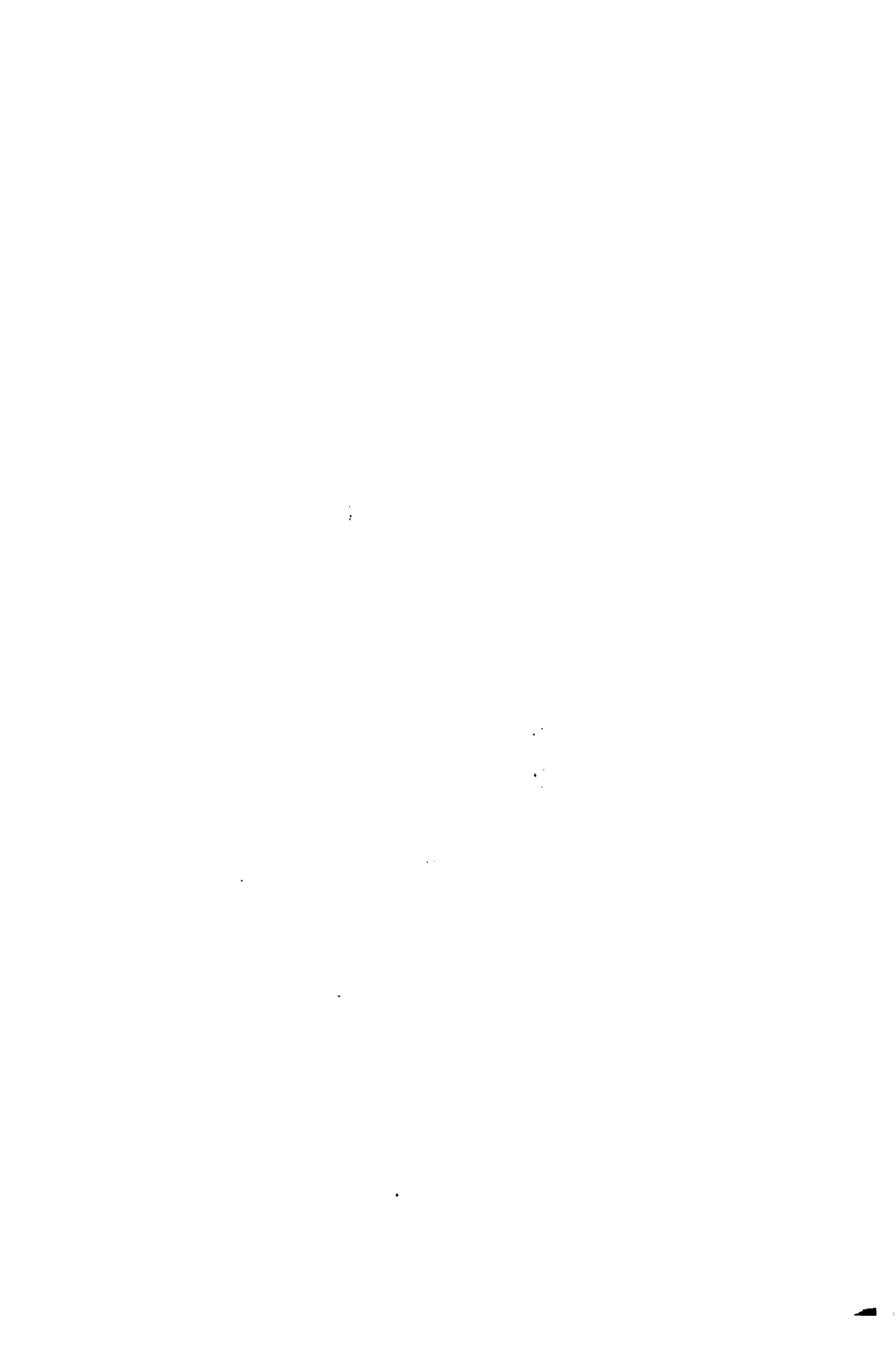
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REPORTS OF CASES

OF THE

SUPREME COURT

OF

NEBRASKA.

1885.

VOLUME XVII.

BY

GUY A. BROWN,

OFFICIAL REPORTER.

LINCOLN, NEB.:

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1885.

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By GUY A. BROWN, REPORTER OF THE SUPREME COURT,
In behalf of the people of Nebraska.

Rec. Dec. 30, 1885

THE SUPREME COURT

OF

NEBRASKA.

1885.

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JUDGES,

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OF

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	F. M. HALLOWELL, . . .	TENTH DISTRICT.

The volume of laws quoted as the "Revised Statutes," refers to the edition prepared in 1866 by E. Estabrook.

The volume of laws quoted as the "General Statutes," refers to the edition prepared in 1873 by Guy A. Brown.

The volume of laws quoted as the "Compiled Statutes," refers alike to the first edition, 1881, and second edition, 1885.

Acts of various years are cited by reference to volume of laws and the year in which they were passed.

This volume contains a report of decisions handed down prior to Sept. 15, 1885, except those previously reported, and some cases in which rehearings have been granted.

The syllabus in each case in this volume was prepared by the judge writing the opinion, in accordance with rule 23.

The court, at the January term, 1885, adopted new rules, which went into effect June 6. These rules appear in an appendix at the end of this volume.

Lincoln, Nov. 1, 1885.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JANUARY TERM, 1885.

PRESENT:
 HON. AMASA COBB, CHIEF JUSTICE.
 " SAMUEL MAXWELL, } JUDGES.
 " M. B. REESE, }

JAMES S. HIATT, PLAINTIFF IN ERROR, V. JEROME B. BROOKS, DEFENDANT IN ERROR.

1. **Stare decisis.** A previous ruling by the appellate court, upon a point distinctly made, may be only authority in other cases, to be followed or affirmed, or to be modified or overruled, according to its intrinsic merits, but in the case in which it is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. *Phelan v. San Francisco*, 20 Cal., 45, quoted in *Wells' Res Adjudicata and Stare Decisis*, § 613.
2. **Public Lands of United States: RIGHTS OF PRE-EMPTOR.** A person entitled by law to pre-empt a tract of public land, or to hold it under the timber culture act, and who is so recognized by the register and receiver of a United States land office, and is by them allowed to make a filing on a tract of public land within their district legally open to pre emption, takes the same and all permanent improvements thereon, if any, together with the exclusive right of possession thereof free from the claims of all persons except the United States.

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3. **Trial: EVIDENCE INSUFFICIENT.** When the evidence which has been offered is not sufficient in law to make out the case of the party who has offered it, it is the duty of the court to so instruct the jury.

ERROR to the district court for York county. Tried below before NORVAL, J. The opinion, taken in connection with that filed when the case was before this court at the July term, 1882, states the facts of the case.

Scott & Gilbert, for plaintiff in error, cited: 6 Wait's Actions and Defenses, 571. *Wolf v. Marsh*, 54 Cal., 228.

Sedgwick & Power and *George B. France*, for defendant in error, cited: Wells' Res Adjudicata, § 613 *et seq.* *Lesse v. Clark*, 20 Cal., 417. *Parker v. Pomeroy*, 2 Wis., 122.

COBB, CH. J.

This case was before this court and disposed of by an opinion in favor of the then plaintiff, now defendant in error, and reported in 13 Neb., 503.

In so far as the written contract between the parties, consisting of the notes and article of agreement, were construed by the court in that opinion, such construction will be adhered to as the law of the case. This court having announced its views as to the proper construction of the contract, and ordered a new trial to be governed by the principles thus announced, it would be inadmissible to review the ground of such opinion, now that the trial court has obeyed such order with the result logically following.

The principal error relied upon in the case at bar is, that the court erred in instructing the jury to find for the plaintiff in the court below, thus taking the consideration of the case from the jury and disposing of it as a question of law. This point not having been involved in the former case will be considered here.

The defendant in the court below having admitted the execution and delivery of the note sued on, it rested upon him to show, as well in his pleadings as by his proofs, a legal defense to its binding force. The answer is too lengthy to be copied here; but the substance is, that the notes with others, together with a certain contract, copies of which were to said answer attached, were executed at the same time and should be considered and construed together; that the sole consideration for the giving of said notes and contract was as set forth in said contract; that the rights pretended to be conveyed to the plaintiff by said contract were guaranteed and warranted by said contract by plaintiff to defendant that they should not fail, otherwise no action could be maintained on said note, etc.; that the land upon which the improvements are situated is unpatented, the title being in the government of the United States; that the improvements specified were put upon said land by John M. and Myron L. Grant; that at the time of the execution of the note, etc., the plaintiff had no title to said property, nor has he since acquired any such title; but that Myron L. Grant, who afterwards conveyed the same to defendant, was the owner and entitled to the possession thereof; that the said note was given without consideration, etc.

From the bill of exceptions I gather the following as the facts in the case: Some time previous to the date of the note sued on, John M. and Myron L. Grant had possession of the north-east quarter of sec. 28, in township 11, range 2 west, and made permanent improvements thereon. These improvements consisted, in part, of a dwelling-house, situated on the west eighty of said quarter section, and other improvements, the character, value, or extent of which are not given, situated on the east eighty thereof. About a year before the date of the note sued on, and of the other notes and contract referred to, the Grants placed the defendant in possession of the said house and improvements,

and one of them at least went to the state of Michigan. We are furnished with no fact as to the nature of the arrangement between the Grants and the defendant, or whether the latter went into the possession of the land with the view of acquiring a right to it under the homestead or preemption laws, or not. While the defendant was in such possession and the Grants absent, Myron L. in the state of Michigan, the plaintiff applied to the United States authorities and obtained the right of possession, popularly called "a filing," of the west half of said quarter section, the part on which the said dwelling-house then occupied by defendant was situated. This he could have obtained only by attacking the right of the Grants to said land and proving that they had abandoned it. And clearly his being admitted to "a filing" on the land gave him the right to the exclusive possession of the land as against everybody but the United States.

It seems that the defendant, although he had been put into the possession of the house by the Grants, recognized the right of the plaintiff not only to the west eighty with the improvements, but recognized his ability to procure the possessory title to the east eighty from the United States for him. And these constituted the consideration for the notes—the house and the right of way from it over a portion of the west eighty, on which plaintiff had a timber culture filing, to the east eighty, and the services and skill of the plaintiff in procuring for the defendant a filing on the east eighty. The plaintiff succeeded in obtaining for the defendant a filing and the right of possession of the east eighty. The defendant occupied the house where it originally stood and the right of way from it to the east eighty as long as it suited him, and finally moved the house on to the east eighty.

In the meantime Myron L. Grant returned from Michigan, and there was a litigation between him and the plaintiff over the said quarter section of land, or a part of it.

This litigation was settled, and upon such settlement, and as expressing the whole or a part of the terms thereof, a writing was executed and delivered by the said Myron L. Grant to the plaintiff, of which the following is a copy:

"I, Myron L. Grant, hereby release all my title, claim, interest, and pre-emption claim, title, and interest in the west half of the north-east quarter of section number twenty-eight in township eleven north, of range two west, sixth p. m., in York county, Nebraska, to the government of the United States, and especially to James B. Brooks, who now holds timber claim entry No. 1146 on same land, dated the 26th day of December, A.D. 1878, taken at the United States land office at Lincoln, Nebraska. This being a full release of all my claim to said land. Dated York, Neb., April 14, 1879.

"MYRON L. GRANT."

There was evidence given at the trial, on the part of the defendant, of statements made by the plaintiff to Myron L. Grant, both before and after the execution of the above writing, which amounted to an indication of a willingness on his part that Grant should remove the improvements from the west eighty; and which, had he not previously sold the house to the defendant, and if acted upon by the said Grant, would probably have amounted to a license justifying him in removing the house off of the land. But such statements would not have the effect to divest the defendant of any right which he had previously acquired to the house in question by purchase from the plaintiff.

I understand it to be the law that when a pre-emptor on the public domain abandons his pre-emption, and leaves buildings or other permanent improvements thereon, he abandons such improvements. And another pre-emptor who becomes entitled to the land by reason of such abandonment would take it, together with all such permanent improvements. It may be, considerations of natural justice would lead to the conclusion that a person who puts

permanent valuable improvements on to a tract of government land, in an unsuccessful effort to hold it by virtue of the pre-emption or homestead laws, should be allowed to take such improvements away at the end of unsuccessful litigation. But such a rule would be difficult of execution, of doubtful general utility, and never has been applied to cases of this kind.

I therefore conclude that, at the date of the execution of the notes and article of agreement, the plaintiff had the legal title and right to the possession of the house; that he conveyed a good title thereto to the defendant; and that such conveyance, without reference to the services and expenses of the plaintiff in procuring the pre-emption filing on the east eighty for the defendant, or the right of way conveyed to defendant over the west eighty, constituted a good consideration for the note sued on. And that no breach of warranty of title was proved, nor any testimony given or offered tending to prove it.

There were no disputed facts upon which the case could turn. The plaintiff acquired the right of possession to the land with all of the improvements by virtue of his filing. He put the defendant in possession, his right to do which could be disputed only by the United States. The defendant then being in possession of the house by virtue of his purchase from the plaintiff, his right to the property could be in nowise affected by any after contract, agreement, or admission between the plaintiff and Myron L. Grant.

In regard to the instruction, I think the law quite well settled that when the testimony is all in one direction, or when all the evidence for the party who holds the affirmative of the issue has been given, and it has no tendency whatever to prove the particular issue relied on to recover, and there is no question in regard to the credibility of the witnesses who have given the evidence, the court may determine the whole case as a question of law. See *Vinton v. Schwab*, 82 Vt., 612. *Boland v. Mo. R. R. Co.*, 36 Mo.,

Ball v. LaClair.

484. As said in the opinion in the latter case: "The credibility of witnesses and the weight of evidence are for the jury; but whether there is any evidence, or what its legal effect may be, is to be delivered by the court." The rule is, as I think, correctly stated by Thompson, in the following words: "When the evidence which has been offered is not sufficient in *law* to make out the case of the party who has offered it, it is the duty of the judge so to instruct the jury." Charging the Jury, § 31.

There was therefore no error on the part of the court in instructing the jury to find for the plaintiff. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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BULA A. BALL AND OTHERS, PLAINTIFFS IN ERROR, V.
JASPER H. LACLAIR, DEFENDANT IN ERROR.

1. **Guardian and Ward: ACTION ON GUARDIAN'S BOND.** A right of action on a guardian's bond, to recover the amount remaining in the hands of the guardian, first accrues to the ward, when such amount is ascertained by the county court on the settlement of the guardian's final account.
2. **Trial: OBJECTIONS TO EVIDENCE.** An objection to the admission of any evidence, on the ground that the petition fails to state a cause of action, may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur. *Curtis & Co. v. Culler*, 7 Neb., 315.

ERROR to the district court for York county. Tried below before NORVAL, J.

France & Harlan and *W. T. Scott*, for plaintiffs in error, cited: *O'Brien v. Strang*, 42 Iowa, 643. *Newton v. Ham-*

mond, 38 Ohio State, 430. *Allen v. Tiffany*, 53 Cal., 16. *Critchfield v. Hall*, 56 N. H., 324. *Salisbury v. VanHoesen*, 3 Hill (N. Y.), 78.

Sedgwick & Power, for defendant in error, cited: 1 Bates Pleading, 337. *Bescher v. State*, 63 Ind., 302. *Davenport v. Olmstead*, 43 Conn., 75. *State v. Humphrey*, 7 Ohio, 223.

COBB, CH. J.

This action was brought in the court below on a guardian's bond, to compel the principal defendant to account for and pay over certain moneys alleged to have been received by her as the guardian of the plaintiff and his sister and assignor, and to hold the other defendants therefor as her sureties on the said bond.

It is not deemed necessary to advert to the pleadings, further than to say that the petition contained no allegation of proceedings in or application to the probate court after the appointment of said guardian and the approval of her bond as such, except the following: "That on the thirteenth day of December, 1882, the probate judge of said Seward county duly granted the plaintiff permission to prosecute suit upon the above described bond or obligation in writing."

Issue was joined and a trial had to a jury, a verdict and judgment for the plaintiff, and the cause brought to this court on error by defendants.

It appears from the bill of exceptions that, upon the commencement of the examination of the first witness on the part of the plaintiff, counsel for defendants objected to the introduction of any evidence on the part of the plaintiff, for the reason that the petition did not state facts sufficient to constitute a cause of action, which objection was overruled, and the evidence received. To which defendants excepted. It was held by this court in the case of

Curtis & Co. v. Cutler, 7 Neb., 315, that "An objection to the admission of any evidence on the ground that the petition does not state a cause of action, may be taken at any time during the progress of the trial, and is not waived by answer or failure to demur," etc. This case was cited with approval by the court in the case of *Catron v. Shepherd*, 8 Id., 308, and the said holding may be regarded as expressing the settled law of this state. Our first duty then, is to see whether the facts stated in the petition do or do not constitute a cause of action which if admitted or proved would authorize the district court to enter judgment in favor of the plaintiff and against the defendants.

Section 16 of article VI. of the constitution provides as follows:

"Sec. 16. County courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, appointment of guardians and settlement of their accounts, in all matters relating to apprentices," * * *

The provisions of statute passed before the adoption of the present constitution, but which not being in conflict therewith are still in force, are as follows: "The courts of probate in their respective counties shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, and the guardianship of minors, insane persons, and idiots." * * * Comp. Stat., chap. 20, sec. 3.

The principal defendant was appointed guardian of the plaintiff and his assignor, by the probate court of Seward county. Under the provisions of the constitution, the county court became the successor of the probate court, and under the provisions of the constitution and the statute combined had the exclusive jurisdiction of the settlement of the accounts of the principal defendant, as guardian of the plaintiff and his sister and assignor. The county court of Seward county clearly had jurisdiction to cite the prin-

cial defendant before it to settle her account as guardian, and to order her to pay into court, or to pay over to her late wards, such sums as should be found due them upon such settlement. And I think that her liability to a suit in a court of law for the balance due her wards on her guardianship account, and certainly the liability of her sureties, would arise only upon her refusal or failure to obey some order of the county court in that behalf.

The cases cited by counsel for the plaintiffs in error, in their brief, fully sustain this view of the law. Counsel for defendant in error cite cases in the supreme court of Indiana which seem to sustain the contrary view. But an examination of these shows that they are predicated mainly upon a peculiar statute of that state.

In the opinion in the case of *Bescher v. The State, ex rel. Hammann*, 63 Ind., 302, cited by counsel for the defendant in error, the court say: "It is now held that the statute authorizing such suits dispenses with the necessity of having previously established such claim; and there was no necessity that the executors should have been removed before bringing the action."

Upon the granting of the letters of guardianship, and approving the bond, the probate court in a sense acquired jurisdiction of the case and of the parties, and it seems to me to be not only logical but in accordance with the weight of authority, that such jurisdiction remains exclusive for the purpose of fixing the liability of the guardian. The petition containing no allegation of the settlement of said guardian's account, or of the fixing of her liability in said court, it failed to state a cause of action.

The judgment of the district court is therefore reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. JOHN T. JONES, V.
ROBERT B. GRAHAM.

Constitutional Law: SALE OF TAX CERTIFICATES. Under the constitution of this state requiring all taxes to be levied upon property so that each person shall pay his just proportion of the same, and prohibiting the legislature from releasing any of such taxes or commuting the same in any manner whatever, the legislature has no power whatever to authorize county commissioners to sell and assign certificates of tax sales of real estate purchased by the county for less than the amount of taxes due thereon, where the property if sold will bring the full amount of such taxes.

ORIGINAL application for mandamus to compel payment of taxes collected by the respondent as county treasurer.

Charles O. Whedon and A. C. Ricketts, for relator.

Harwood, Ames & Kelly, for respondent.

MAXWELL, J.

The relator is the treasurer of the city of Lincoln, and the defendant the treasurer of Lancaster county. In May, 1884, the treasurer of Lancaster county sold lot 10, in block 18, in South Lincoln, to Lancaster county, for the delinquent taxes of every kind due thereon, and executed a certificate of purchase to said county. On or about the ninth day of September, 1884, the county commissioners sold and assigned the certificate to C. W. Coffyn for fifty and one-half per cent of the face value thereof. On the twenty-sixth of September, 1884, the owner of the lot redeemed the same from tax sale by paying all the taxes due thereon, with interest, penalties, and costs. Of the amount thus paid, the sum of \$20.88 was for delinquent taxes and interest thereon due the city of Lincoln. The relator thereupon demanded said sum of the defendant, who refused to

17	43
59	8
59	267
59	428
17	43
60	156
60	419

pay the same to him, for the reason that it belongs to Coffyn under the assignment.

That county commissioners may purchase real estate upon which the county has a lien for taxes, after such real estate has been offered for sale and not sold for want of bidders is now well settled in this court,* but the relator denies their authority to assign the certificate of purchase for one-half of the face value. [Comp. Stat., chap. 77, art. III., sec. 2.] The relator also questions the validity of the act authorizing the assignment of tax certificates by a county, for want of a sufficient title. Without entering into a discussion of the question of the title of the act, we think the provisions of the statute transcend the power of the legislature.

Section 1, article IX., of the constitution, reads as follows:

"The legislature shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property and franchises, the value to be ascertained in such manner as the legislature shall direct, and it shall have the power to tax peddlers, auctioneers, brokers, hawkers, commission merchants, showmen, jugglers, inn-keepers, liquor dealers, toll bridges, ferries, insurance, telegraph, and express interests or business, venders of patents, in such manner as it shall direct by general law, uniform as to the class upon which it operates."

Section 4 provides that "the legislature shall have no power to release or discharge any county, city, township, town, or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in *any form* whatever."

* *Shelley v. Towle*, 16 Neb., 194. *Otoe County v. Brown*, Id., 394.

Revenue is to be provided by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his, her, or its property and franchises, and the legislature shall have no power to release any county, city, etc., or the inhabitants thereof, from their proportionate share, nor shall commutation be authorized in any form. Stronger language could scarcely be used. In effect, the constitution guarantees to every property owner in the state that his property shall be liable for the just proportion of taxes due thereon according to the valuation as ascertained by law, and for no more. It deprives the legislature of the power to add to this amount or to discriminate between taxpayers in any manner or form.

Now, what the legislature cannot do directly, it cannot do indirectly. If it cannot say to A, you must pay the entire taxes levied upon your property, and to B, you need pay but fifty per cent of the amount thus levied, it cannot accomplish by indirection what it is prohibited expressly from doing. It is not the policy of the law to encourage the opening of a broker's shop at the place of business of every board of county commissioners by authorizing them, where the property is of value equal to the taxes due thereon, to receive less than the amount thereof. Such practice, if sanctioned, would lead to favoritism and fraud, and practically nullify the constitutional provisions. If the property will not sell for sufficient to pay the delinquent taxes due thereon—an extreme case—it is possible the legislature may possess the power to authorize the sale for less than the taxes due. But that question is not before the court.

Suppose A has yearly paid his taxes in full. His neighbor, B, who has valuable property adjoining that of A, fails to pay his taxes, as in this case, for twelve years, when the county purchases the property for the delinquent taxes due thereon, and soon thereafter assigns the certificate to a convenient friend of B for one-half of the amount of taxes due on the property. The other fifty per cent is to be

made up by levying again on all the property in the county and city, including that of A and those who have already paid their taxes in full. Such procedure not only deprives those who have fully paid their taxes of the constitutional guaranty that taxes shall be levied equally on all property, so that that of each person shall pay its just proportion, but offers a premium to every taxpayer to evade the payment of taxes. It is very clear that the legislature possesses no such power, and the assignment in the case under consideration is a nullity; but the assignee is entitled to have the money so paid by him refunded with interest. A writ of mandamus will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	46
29	407
17	46
37	643
17	46
55	336
17	46
60	721

GEORGE J. VOLLAND, PLAINTIFF IN ERROR, v. GEORGE H. WILCOX, DEFENDANT IN ERROR.

1. County Courts: VACATING JUDGMENT. A county court for sufficient cause, may vacate or modify its own judgments in term cases, during the term at which they were rendered.
2. ———: ———: TRIAL. On the facts stated in the opinion, *Held*, That the judgment should have been vacated and a trial on the merits granted.

ERROR to the district court for Hall county. Heard below before GEORGE W. POST, J.

Dilworth & Smith, for plaintiff in error.

T. O. C. Harrison, for defendant in error.

MAXWELL, J.

This action was brought in the county court of Hall

county by the plaintiff against the defendant to recover the sum of \$255.00 and interest upon two promissory notes, amounting in the aggregate to \$250, and an account for \$5. The defendant in his answer denies the account; "admits the execution of the notes, but alleges that they were given for a span of mares; that the plaintiff falsely represented that said mares were respectively five and six years of age; also, that he represented that said mares were true, sound, and kind, good brood mares, and a good, strong, reliable farm team." That "said mares were so old that they were unfit for work, and could not be used in farming because they were so old and weak that they could not stand any labor." It is also alleged that one of the mares died about six weeks after the purchase, and that the other was of no value whatever. The defendant claims damages in the sum of \$300, without stating any special facts that would entitle him to special damages. He also pleads a set-off of \$100 for the value of an ox taken by the plaintiff. The summons was issued June 19th, 1882, returnable July 3, 1882. At the time of the return of the summons the defendant appeared and required the plaintiff to give security for costs, which was given. An answer was then filed by the defendant, and the cause continued till the 12th day of July, 1882, at 9 o'clock A.M. On the 10th of that month Mr. Laird, the plaintiff's attorney, sent the following telegram to the county judge:

"HASTINGS, 7-10, 1882.

"Hon. H. H. Caldwell, County Judge, Hall Co., Neb.:

"In Volland v. Wilcox, will you say to his att'y that we have a material witness absent and shall have to continue for two weeks, and ask if he will agree. Answer.

"JAS. LAIRD."

To which he received the following reply :

"GRAND ISLAND, NEB , July 11th, 1882.

"*Jas. Laird, Hastings :*

"Abbott will agree to continuance for two weeks if a reply is filed.

"CALDWELL."

Laird thereupon sent a telegram to Mr. Abbott, as follows :

"HASTINGS, 7-11, 1882.

"*Hon. O. A. Abbott, Grand Island, Neb.:*

"In the Wilcox case we accept your proposition.

"JAS. LAIRD."

Laird also swears that at the time of sending the last dispatch he wrote to Judge Caldwell "stating the substance of said agreement." No copy of the letter is set out in the record, however, nor does it appear at what time it was received by the judge. It also appears that the word "Abbott," in the telegram from Caldwell to Laird, was a mistake of the telegraph operator, and should have been "Att'y." Mr. Abbott is not the defendant's attorney of record, and there is nothing to show that he was in any way connected with the case. On the 12th of July, 1882, at the time set for trial, the defendant appeared, and, after waiting one hour, the plaintiff or his attorney failing to appear, the defendant was sworn as a witness, and the court thereupon rendered judgment in his favor against the plaintiff for the sum of \$131.25 and costs of suit. Two days thereafter Laird filed an affidavit setting up the above facts, with copies of the telegrams above referred to in support of a motion to set the judgment aside. The motion was overruled. The plaintiff then took the case on error to the district court, where the judgment was affirmed.

Section 7, of the act approved March 3, 1873, "concerning the organization, forms, and jurisdiction of probate courts," [Comp. St., chap. 20] is as follows: "It shall be the duty of the probate judge of each county to hold a regular term of the probate court at his office at the

county seat, commencing at nine o'clock A.M., on the first Monday of each calendar month, for the trial of such civil actions brought before such court as are not cognizable before a justice of the peace. Such regular term shall be deemed to be open without any formal adjournment thereof, until the third Monday of the same month, when all causes not then finally determined shall be continued by such court to the next regular term, but such courts shall be deemed to be always open for the filing of papers and issuance of process in civil actions, and for the purpose of taking and entering judgment by confession."

Sec. 8 provides that, "In all cases commenced in said courts wherein the sum exceeds one hundred dollars, it shall be the duty of the probate judge to issue a summons, returnable on the first day of the next term of said court, if there be ten days intervening between the issuance of the summons and the first day of the term, and if not then to be made returnable on the first day of the next term thereafter, which summons shall be directed and delivered to the sheriff or any constable of said county, and the sheriff or constable shall serve the same upon the defendant as in other civil cases, at least ten days before the return day thereof. When the summons has not been served ten days before the first day of the term the cause shall stand continued until the next regular term of said court, and shall then stand for trial without further notice to the defendant."

Sec. 10 provides that, "In all civil actions in the probate court where the amount claimed exceeds one hundred dollars, the plaintiff, his agent or attorney, shall, before the summons is issued thereon, file in such court a bill of particulars setting forth in ordinary and concise language his demands; and the defendant shall also, on or before the first day of the term at which the cause stands for trial, file in such court his answer containing any set-off or other defense he may have. Such bill of particulars shall be

verified in like manner as a petition is required to be verified in the district court, and when so verified no other or greater proof shall be required to entitle the plaintiff to judgment upon default than in actions in the district court."

Sec. 11 provides that, "In actions before said court where the amount claimed exceeds one hundred dollars, motions and demurrers shall be allowed, and the rules of practice concerning pleadings and processes in the district court shall be applicable, so far as may be, to pleadings in the probate court."

Sec. 12 provides that, "If no answer is filed on or before the first day of the term, in any action to be tried during such term, the plaintiff may have the default of the defendant entered, and may proceed to judgment on any succeeding day during the term, upon proving his cause of action."

Sec. 15 provides that, "The probate judge shall, on the first day of each term, or as soon thereafter as may be, prepare a calendar of the causes standing for trial at such term, placing the causes upon such calendar in the order in which the same are numbered on the docket, and setting the causes for trial, in such order, upon convenient days during such term; and the provisions of this code relative to the trial docket in the district court shall, so far as they are in their nature applicable, apply to such calendar."

It will be seen that in term cases the practice to a considerable extent is the same as in the district court. And without doubt the same power exists to control its judgments during the term at which they are rendered. That the district courts possess the power to vacate or modify their judgments at the term at which they are rendered is unquestioned. *Smith v. Pinney*, 2 Neb., 139. *McCann v. McLellan*, 3 Id., 25. *Wise v. Frey*, 9 Id., 220. *Hansen v. Bergquist*, 9 Id., 277. This power is conferred to prevent injustice, as where a judgment is entered by mistake or under such circumstances as to satisfy the court that it ought to be set aside.

In *Millspaugh v. McBride*, 7 Paige, 509, it is said: "I think the counsel for these defendants has been successful in showing that it is within the power of the court to open a default, even after enrollment, for the purpose of giving a defendant an opportunity to make his defense, where such defense is meritorious and he has not been heard in relation thereto, either by mistake or accident, or by the negligence of his solicitor. The cases of *Kemp v. Squire*, 1 Ves., Sen., 205, and of *Robson v. Cranwell*, 1 Dickens, 61, show that the enrollment may be discharged when necessary for the purpose of opening the decree. And in *Beekman v. Peck*, 3 Johns. Ch., 415, Chancellor Kent set aside a regular decree by default, upon motion after enrollment to let in a defense upon the merits." See also *Tripp v. Vincent*, 8 Paige, 176. *Curtis v. Ballagh*, 4 Edw. Ch., 635. *Herbert v. Rowles*, 30 Md., 271. *Loree v. Reeves*, 2 Mich., 134. *Hurlbut v. Reed*, 5 Id., 30. Freeman on Judgments, § 100.

In *Hansen v. Bergquist*, 9 Neb., 269, it was held in effect that county courts possess the power to vacate or modify their judgments during the term at which they were rendered; and such ruling is in furtherance of the proper administration of justice. We therefore adhere to it.

In the case under consideration there certainly was a sufficient reason shown why the plaintiff failed to appear at the trial, and he was not guilty of laches. He should not therefore be deprived of his rights by a mistake of the telegraph operator. This being so, the court should have set the judgment aside and permitted a trial upon the merits. The judgment of the district court and also of the county court is reversed and the cause remanded, the costs, except in this court and the district court, to abide the event of the suit.

JUDGMENT ACCORDINGLY.

THE other judges concur.

J. THOMPSON BAKER ET AL., PLAINTIFFS IN ERROR, V.
ALURED N. WISWELL, DEFENDANT IN ERROR.

1. **Statute of Frauds: PART PERFORMANCE.** Part payment of the purchase price of real estate is not such part performance as to take an oral contract of sale out of the statute of frauds.
2. **Real Estate: SALE.** An oral agreement for the sale of real estate must possess the elements of certainty, and be established by clear and satisfactory proof.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

Stowell & Kelligar, for plaintiffs in error.

L. W. Colby and Hazlett & Bates, for defendant in error.

MAXWELL, J.

This is an action to recover the sum of \$2,000 and interest for nine reaping machines sold by James S. and E. C. Marsh to the defendant. The plaintiff claims as assignee of the Marshes. The defendant in his answer admits the purchase of the machines, but alleges as a defense, first, that he sold to said Marshes 560 acres of land in Kansas and his interest in three sections of school land in Gage county, which he had leased from the state, and also a considerable amount of personal property, all being of the value of \$7,000; that the contract was to be reduced to writing, and the Marshes were at that time to pay a certain amount of money and deliver a certain number of reapers known as "No. 4" and "Valley Chief," and also deliver a number in the year 1878, and that the reapers in question were delivered in pursuance of such agreement. Afterwards the defendant and the Marshes were unable to agree upon the terms of the contract, consequently it was not reduced to writing, but the defendant claims to have

fully performed his part of said agreement, and therefore prays judgment for damages for breach of contract in the sum of \$18,604, etc. There is also a count in the answer pleading a submission of the matter in controversy to arbitrators and an award, but as the award was set aside by the district court we need not consider that question. The defense rests entirely upon the validity of the alleged contract. If that is invalid the whole defense fails.

The testimony covers nearly three hundred pages, but in our view it does not establish a completed contract. The defendant himself shows this to be the case. Upon the question of the contract he testifies as follows:

Q. What was the price of the school sections?

A. The Giddings school section was three thousand dollars.

Objected to as incompetent, irrelevant, and immaterial. Objection overruled. Plaintiffs except.

Q. And what was the other school section?

A. The Crocker section, two thousand dollars, six hundred dollars in money the balance in machines; the Dixon was two thousand dollars, five hundred in money the balance in machines.

Q. In what machines? What machines were to be paid?

A. They were to be No. 4, what is called Marsh No. 4, with the exception of what Valley Chiefs were here in Beatrice.

Q. At what price?

A. The No. 4 machines I agreed to take at \$150 here with the freight added, and the Valley Chiefs at \$125 with freight added.

Q. Was there any personal property at that time traded?

A. Yes, six head of horses, three sets of harness, and header, corn plows, and breaking plows, tools used for three teams to farm on the Giddings section.

Q. What was the price of them?

A. They were a thousand dollars in money.

Q. This land in Kansas, what kind of a title was that?

A. That was a warranty deed; straight title from me to Marsh.

Q. These school lands, how about them?

A. I just signed my interest in them, the lease; I had a lease and so signed them over, made out the papers and so signed them.

Plaintiffs object to the statement relative to his having leases as incompetent and not the best evidence. Objection overruled. Plaintiffs except.

Q. How much of this was to be paid and when was it to be paid?

A. He was to pay me five hundred dollars cash, and was to pay Crocker six hundred dollars cash, I think in six months or the first of January; I forget just the time; and pay a thousand dollars in six months for this personal property on the place, and the balance in No. 4 machines, except the Valley Chiefs here in town.

Q. State what was the agreement in regard to machines here in Beatrice. Were you to take them?

A. Yes, I was to have all machines in Beatrice.

Q. How many were there?

A. Twenty No. 4 and eight Valley Chiefs.

Q. These nine for which this suit was brought, were they part of those in Beatrice?

A. Yes.

Q. State what was done with Marsh about turning over the machines in Beatrice.

A. When we made the trade he was to draw up the writing to pay so much money; he said he wanted a writing made to show he had paid the money; in a few days, I think the next Saturday, and then I was to take the machines and sell them; he said he would give them to me; that day came and he did not have the money, and he said

he wanted me to give him a week or ten days to pay the money; he was going to get it of his brother and it did not come. I told him if I was going to have the machines I wanted to know; he said he would go and turn over all of the machines on the contract and make me safe, and then when the money came would fix the contract, and he did so.

Q. When was this that the machines were turned over, do you remember the exact time?

A. No, I don't remember the exact time. Either the last of July or first of August, just before we went to harvesting, but three parties were talking of buying and I wanted them to sell.

Q. These nine machines mentioned in the petition, are they the same machines turned over to you by Marsh at that time?

A. Yes, on this trade.

Q. What attempts have been made by Marsh or his agent, E. C. Marsh, since that time to comply with the agreement on his part to have the machines and money turned over?

A. I told him I had the property just as I agreed to, and was willing at any time, and wanted him to come up to the agreement; he said Marsh could not pay the money.

Q. State what arrangements had he made or tried to make in regard to getting this money.

Objected to as immaterial. Objection overruled. Plaintiffs except.

A. He said he would see if he could get the money for me. I had some paper at the bank, and had calculated on this to pay it. He said he would go into the bank and see if he could not make satisfactory arrangements.

Q. Did you go there together?

A. Yes, all together.

Q. What statements were made by Marsh at that time?

A. He told Smith he was to pay me some money and

it hadn't yet come, and I was anxious for the money, and he wanted to make arrangements with him to get it; said he had traded me for all the land, all, I think, in this county.

Q. State whether on or about the fifth of October, 1877, or other times, you made demands on plaintiff to comply with this agreement on his part, and if so state what he said and what you said?

A. I told him I wanted him to fix it up, and that I wanted the balance of the machines and the money, and had the papers all ready and was waiting, and wanted to know what he was going to do. I was willing to trade just as we said and wanted him to comply with his part of the contract, and he refused.

Q. State if you were ready and willing to comply with the terms of the agreement on your part?

A. Yes, and the reason he did not was, he did not have the money; he told me so; he supposed his brother was going to get it for him.

Q. You can state if you had a conversation with E. C. Marsh, in McConnell's office, in regard to turning over these machines, and if so, state what was said and done there in McConnell's presence, as near as you can state it.

A. I went there to see him about the machines—that is, he agreed to pay me the money before this, and I went in that day to see if he had got his money yet; he said he hadn't got it, and wanted me to wait a few days longer. I told him I wanted the machines if I was going to have them; if I was going to sell machines I had to have them right away, and if he was going to finish the trade with me I wanted the money and machines. He said, "You will have to wait, I have not got the money and cannot get it, but," he said, "I will tell you what I will do; I will turn over all the machines in this town, and that will make you safe, and we will have more brought here before they are sold." And he did so, and went and turned over the ma-

chines at Harrison's; and he thought the money would be here before next week.

On cross-examination he states in regard to this contract as follows:

Q. There was no change of possession, they remained with Giddings after that?

A. Yes, they staid there with Giddings, and he agreed with Marsh to have them at any time I said so.

Q. That was before you went and got that writing done, was it not?

A. Yes, that time was.

Q. The times you went and got the writing drawn were in Beatrice?

A. Yes, sir.

Q. Fix the date as near as you can.

A. I think that the next Saturday we fixed the day and drew the writings; he wanted to pay me five hundred dollars in money, and he could not do it; he did not have the money and wanted me to wait another week until he got the money from his brother; and it run along about a week and I went and saw him again; he told me he had not any money yet, and wanted me to still wait; and I said I wanted to sell the machines; he said I could have the machines.

He also testifies that when the Marshes and himself attempted to reduce the contract to writing, in September, 1877, they were unable to agree upon the terms, one of the causes of disagreement being that he was to receive of the machines thereafter to be sent to Beatrice those known as No. 4, and not Valley Chiefs, the No. 4 being more valuable than the others. There were other causes of disagreement to which it is unnecessary to refer. It is very clear that the parties did not consider this a completed contract until the writings were drawn and the money paid, and the defendant was permitted to take the machines in question because there was a market for them at that time, but

he did not waive the payment of the money. The situation was this, according to his own testimony, that he was ready to comply with the oral agreement provided the Marshes paid the money, otherwise not. Suppose the Marshes had agreed orally to purchase a farm and certain stock thereon from a farmer, the agreement to be reduced to writing and certain cash payments made at the time the written agreement was entered into, and afterwards machines were delivered over for present use at the request of the vendor of the farm! In case of the failure of the vendee to perform on his part, could the vendor enforce such contract? We think not. A verbal contract for the sale of land where partly performed by the party seeking the enforcement of the contract, will, in a proper case, be enforced, but mere payment of a portion of the consideration is not sufficient to take the case out of the statute of frauds. The grounds of the remedy are, that it would be a virtual fraud on the plaintiff, for the defendant, after permitting acts of part performance which change the relation of the parties and prevent a restoration to their former condition, to interpose the statute as a defense and thus secure to himself the benefits of the plaintiff's part performance, while he would be left without adequate remedy at law and liable for damages as a trespasser. 3 Pom. Eq., § 1409 and cases cited in notes. But the acts of part performance that take the case out of the statute are actual possession and the construction of valuable improvements, or perhaps in some cases, as where the land was wild, cultivation. In *Poland v. O'Connor*, 1 Neb., 50, it was held that payment of a small portion of the purchase price is not such a part performance as will take the contract out of the statute of frauds. *Temple v. Johnson*, 71 Ill., 13. *Glass v. Hurlbert*, 102 Mass., 28. *Wood v. Jones*, 35 Tex., 64. Brown on Statute of Frauds (4th Ed.), § 462. *Holmes v. Evans*, 48 Miss., 248. *Minturn v. Baylis*, 33 Cal., 129. *McGuire v. Stevens*, 2 Am. R., 649. *Fry v. Platt*, 80 Alb. L. J., 454.

Whether when the entire consideration is paid and possession delivered so that the plaintiff has fully performed on his part, or the compensation is the personal services of the plaintiff the contract would be enforced, is not now before the court. But we are not aware of any recent case holding that part payment alone is sufficient to take the case out of the statute. We therefore hold that so far as the real estate at least is concerned the oral agreement cannot be enforced, and is not a proper foundation on which to recover damages.

There is too much uncertainty also as to the nature of the alleged agreement. An oral agreement to be enforced must possess the elements of certainty. The court cannot supply by conjecture what should be established by clear and satisfactory proof. On some important points, as in regard to the kind of machines the Marshes were to furnish the defendant, there is an entire failure to establish clearly the kind to be furnished. The alleged agreement, therefore, is insufficient. *Pomeroy's Equity*, § 1499. *Lester v. Foxcroft*, Colles P. C., 108, cited 2 Vern., 456. 1 Eq. Lead. Cas., 1027, 1038, 1042 (4th Am. Ed.) *Clinan v. Cooke*, 1 Sch. & Lef., 22. *Newton v. Swazey*, 8 N. H., 9. *Tilton v. Tilton*, 9 Id., 385. *Eaton v. Whitaker*, 18 Conn., 222. *Hall v. Whittier*, 10 R. I., 530. *Freeman v. Freeman*, 43 N. Y., 34. *Welsh v. Bayaud*, 21 N. J. Eq., 186. *Greenlee v. Greenlee*, 22 Pa. St., 225. *Cole v. Cole*, 41 Md., 301. *Semmes v. Worthington*, 38 Md., 298. *Murphy's Adm'r v. Carter et al.*, 23 Gratt., 483. *Lowry v. Buffington*, 6 W. Va., 249. *Church of the Advent v. Farrow*, 7 Rich. Eq., 378. *Ford v. Finney*, 35 Ga., 258. *Johnson v. Bowden*, 37 Tex., 621. *Farrar v. Patton*, 20 Mo., 81. *Feusier v. Sneath*, 3 Nev., 120. *Morgan v. Bergen*, 3 Neb., 209. *Gregg v. Hamilton*, 12 Kas., 333. *Northrop v. Boone*, 66 Ill., 368. *Fall v. Hazelbrigg*, 45 Ind., 576. *Grant v. Ramsey*, 7 Ohio St., 157. *Armes v. Bigelow*, 3 McArth., 442. *Hiatt v. Williams*, 72 Mo., 214. *Bohanan*

v. Bohanan, 96 Ill., 591. *Jefferson v. Jefferson*, 96 Id., 551. *Marshall v. Peck*, 91 Id., 187. *Wallace v. Rappleye*, 103 Id., 229. *Littlefield v. Littlefield*, 51 Wis., 23. *Seaman v. Aschermann*, Id., 678. *Manly v. Howlett*, 55 Cal., 94. *Hanlon v. Wilson*, 10 Neb., 138. *Lamb v. Hinman*, 46 Mich., 112. *Jamison v. Dimock*, 95 Pa. St., 52. *Newkumet v. Kraft*, 10 Phila., 127. *Wharton v. Stoutenburgh*, 35 N. J. Eq., 266. *Sherman v. Scott*, 27 Hun., 331. *Barnes v. Boston, etc., R. R.*, 130 Mass., 388.

As to the personal property proposed to be sold to the Marshes, if it can be separated from the real estate, it is possible that whatever damages the defendant may have sustained by the failure to take the same may be recouped from the price of the machines. We do not so decide, however, as the question is not before the court.

The judgment of the district court is reversed, and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

17	60
19	482
17	60
46	672

MICHAEL D. LONG, PLAINTIFF IN ERROR, V. THE STATE OF NEBRASKA, EX REL. NERI T. HOXIE, DEFENDANT IN ERROR.

1. **Mandamus: DEFECTS IN ALTERNATIVE WRIT: WAIVER.** Where an alternative writ of mandamus fails to state facts sufficient to entitle the relator to the performance of the duty sought to be enforced, such defect may be taken advantage of by a demurrer, the same as in any other action, and the same right to answer, in case the demurrer is overruled, will exist in favor of a respondent as in any other proceeding.—[Per MAXWELL and REESE, J.J.]

2. **Elections: CANVASSING RETURNS: MANDAMUS.** Where there are but one set of papers purporting to be the returns of an election from a given precinct delivered to the county clerk, or his deputy, or in his office, within the time limited by law for the canvassing of the returns of such election, it is the duty of such clerk to canvass such returns in the manner provided by statute, although such returns may not have been sealed up, marked, bound together, or directed as provided by law. And such duty will be enforced by mandamus.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

Thomas Carlon and D. A. Holmes, for plaintiff in error.

H. M. Utley, for defendant in error.

COBB, CH. J.

This is a case of error to the district court of Holt county for the allowance of a peremptory writ of mandamus against the plaintiff in error, who is county clerk of said county, requiring him to canvass certain votes cast in said county at the general election of 1883.

Two questions are presented by plaintiff in error in his brief:

1. That the alternative writ is insufficient as a basis for the awarding of a peremptory writ, for the reason that the alternative writ fails to disclose any interest in the subject matter of the proceeding on the part of the relator, even that he is a citizen of Holt county.

2. The duty enjoined upon a board of canvassers is of a quasi judicial character, while the writ of mandamus will only issue to compel the performance of a purely ministerial duty.

In the case of *The State v. Stearns*, 11 Neb., 104, this court, by Ch. J. MAXWELL, say: "The objection that the relator cannot maintain the action is not well taken. When the question presented is one of public right, and the object

of the action is to enforce the performance of a public duty, it is sufficient for the relator to show that he is a citizen, and as such interested in the execution of the laws." [Citing authorities.] "Sufficient appears in the application to show that the relator is a citizen and interested in the execution of the laws. This statement should have been made in the alternative writ also, as the writ must contain a statement of all the facts relied upon to entitle the party to the relief prayed for. But the objection is to the want of legal capacity of the relator to sue, and unless objected to by demurrer or answer is waived."

In the case at bar the affidavits upon which the alternative writ issued, and which stand in the place of a relation to it, are not sent up with the record. The plaintiff in error, being ex officio clerk of the district court of Holt county, is the legal custodian of said affidavits; beside, it was his duty to bring up all the records which might contain the allegation, of the absence of which he seeks to take advantage. It must therefore be presumed that the absent relation contains the allegation of citizenship on the part of the relator.

The plaintiff in error made answer to the alternative writ, his answer consisting of six paragraphs, the first of which being in the following words:

"1. That the allegations of said writ, and the facts recited therein, are not sufficient to put respondent upon his defense or warrant him in obeying the command of said writ."

This is, to all intents, a general demurrer to the alternative writ, a pleading which is not recognized in this class of cases by the statute. "No other pleading or written allegation is allowed than the writ and answer. These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; * * *" Code, § 653.

I do not understand this statute to mean that while de-

murrers are not recognized in this proceeding, yet that a party defendant may insert a paragraph in the body of his answer, which he may have treated as a general demurrer. But I think that demurrers are no more allowed to a writ of mandamus in effect than they are in form. But it may be asked, is there no way by which the respondent may take advantage of an informal or defective alternative writ of mandamus? My reply to that question is, that whatever defects in a writ of this kind could have been taken advantage of under the old system of practice by plea, can now be, by answer. Plea in abatement was then the appropriate pleading. An answer in the nature of a plea in abatement is the appropriate, I think the only one, now. But it was an inflexible rule governing pleas in abatement, that they always gave a better writ. That is to say, they not only suggested that the writ plead to was defective, but pointed out in what its defectiveness consisted, and how it could be made perfect. And this rule was well founded in reason and convenience, and is quite adapted to our present liberal practice in regard to amendments. In the case at bar, had the defendant in his answer pointed out the defect in the allegations of the writ, it is scarcely to be supposed possible that the relator, with the provisions of statute above quoted before him, would have failed to amend his writ. It must therefore be held that the plaintiff in error, by omitting to point out by answer the defects now insisted upon in the writ, waived the same, and cannot be heard upon them in this court.

2. The 2d, 3d, 4th, 5th, and 6th paragraphs of said answer may be considered together. In the first the defendant alleges that he, on the tenth day of November, 1883, together with Frank Campbell and D. C. Hamson, two disinterested electors of Holt county, proceeded to canvass the returns of the election, etc.; and did canvass all returns received by him prior to the final adjournment of said board, except the votes cast for county clerk of said

county. In the second he alleges that on the twelfth day of November, 1883, the county judge of said Holt county called to his assistance Frank Campbell and D. C. Hamson, two disinterested electors of said county, and proceeded to canvass the returns of votes cast at said election for county clerk, etc. By the fourth he alleges that after the said canvass had been made, and prior to the service upon him, the said respondent, of the alternative writ of mandamus in the said action, the respondent issued certificates of election to the various county officers, naming them. By the fifth, that prior to the completion of the canvass of the returns of the said election, official returns of such election had been received by the respondent from each and all of the various precincts of said county, except one, to-wit, Wyoming, from which said precinct no returns were received prior to the completion of said canvass, nor have any legal returns of the election held in said precinct ever been received by respondent as provided by law. And by the sixth paragraph, that prior to the commencement of the canvass of the returns of the said election, and before the said Frank Campbell and D. C. Hamson had been called by respondent to assist him in the canvass of the said returns, there was handed to E. S. Kinch, deputy county clerk of said county, by a certain resident of Wyoming precinct, a common paper sack, such as is used by merchants for doing up articles of merchandise, which paper sack was unsealed, and bore the inscription "Wyoming precinct," only, and was said to contain the returns of an election held therein. That no evidence was furnished to respondent, either prior to or during the canvass of the returns of the various precincts of said county, tending to prove that said sack contained the returns of the election held in said precinct, and the contents of said sack were not included in the canvass of the returns of said election, and no returns were ever made or received from said precinct.

It seems sufficiently clear from the above that the returns of the election from Wyoming precinct were received at the office of the county clerk in time to have been canvassed along with the other returns; but that they were not canvassed, for the reason that they were contained in a common paper sack, and were not sealed up nor properly directed.

Almost if not precisely this question has been before this court in a number of cases, and the holding has been uniform, to the effect that the duties of canvassers are purely ministerial. A case might occur of two or more sets of papers being sent in, both purporting to be returns of the same election from the same precinct. In that case I think that the canvassers would of necessity be obliged to exercise some discretion or quasi judicial power in order to select which set of papers should be treated as the returns; but I can imagine no other case in which they are possessed of any discretion or judicial power whatever. It is doubtless the duty of the judges of the election to seal up the returns, and among other things to direct them to the county clerk; but a failure to discharge this duty by the judges of election in the manner provided by law, will by no means excuse the county clerk for failing to canvass such returns as in point of fact are delivered to him within the time limited by law.

In the case at bar the package was delivered to the clerk's deputy, presumably in the office. Although unsealed and otherwise informal, he knew what it was. There was no other package before him which was claimed to be returns of the election from Wyoming precinct, so the only theme for mental debate which the situation presented to the board was, whether they would obey the law or not.

I deem it only necessary to refer to the cases of *The State, ex rel. Birmingham, v. Dinsmore*, 5 Neb., 145. *Hagge v. The State*, 10 Id., 51. *The State, ex rel. Townsend, v. Hill*, Id., 58. *The State v. Stearns, supra*.

The judgment and final order of the district court are affirmed.

JUDGMENT AFFIRMED.

REESE, J.

While I concur in the final conclusion arrived at in the foregoing opinion, I am compelled to express my dissent from a part of the argument by which that conclusion is reached.

As to the doctrine quoted from *The State v. Stearns*, 11 Neb., 104, I have nothing to say, that being now, perhaps, the settled law of this state. Were the question before this court for the first time, I think I should insist upon the rule that the relator must *by his writ* show all the facts necessary to entitle him to the peremptory writ, and that the affidavit upon which that writ was founded could not be looked to as a prop or brace to sustain that which the statute says must be the *only* pleading except the answer. Upon the allegations of that pleading—made so by express statute—I think the relator should stand. The alternative writ is his petition. By that and that alone should his case be measured so far as the allegations or statements of fact are concerned. But this court having held otherwise, by a written opinion in which the merits of a case were passed upon, I do not propose further discussion of the question.

In my opinion the rules of practice in mandamus cases should be the same as in other cases, except in so far as they are changed by statute; and that the section of the statute (653, civil code) quoted in the foregoing opinion, must be construed in connection with section 89 of the same code. This section provides that, "The pleadings are the written statements by the parties of the facts constituting their respective claims and defenses." By reference to section 653 we find that "no other pleading or

written allegation is allowed than the writ and answer." By this language we are forced to the conclusion that the word "pleading," in this section, refers to the allegations of fact in the sense in which the word is used in section 89; that the purpose of the statute was and is to limit the pleadings by which the issues of fact are formed to the two named; that the writ should take the place of the petition and be subject to amendment "in the same manner" as the petition in a civil action, and that the answer should be subject to the same rule. In my view, the office of a demurrer being for the purpose of testing other pleadings rather than that of a pleading itself, it was not thought of or contemplated by the legislature in the adoption of the section above quoted. It cannot be held to be a "written allegation" in the sense used in the section. The statute, referring to the writ and answer, says: "These are the pleadings in the case, and have the same effect and are to be construed and may be amended in the same manner as pleadings in a civil action; and the issues *thereby joined* must be tried, and the further proceedings thereon had in the same manner as in a civil action" In my opinion this section refers alone to the formation of issues of fact.

The legislature by the adoption of the present law sought to simplify as much as possible the proceeding which had formerly been held to be the special property, the high prerogative, of the king. To my mind it has succeeded. The proceeding by mandamus now stands substantially upon the same plane as other cases. If the writ does not state facts sufficient to entitle the relator to the remedy sought it should be demurred to, and the question of its adequacy decided before proceeding further. If the writ is found to be sufficient, then issues of fact can be formed by filing an answer, "and the issues *thereby joined* must be tried * * * in the same manner as in a civil action."

I cite the following authorities which, I think, support

the views herein expressed: *The State, ex rel. Ayres, v. Stockwell*, 7 Kan., 98. *The State, ex rel. The A., T. & S. F. R. R. Co., v. The County Comrs. of Jefferson County*, 11 Id., 67. High on Ex. Leg. Rem., § 451.

MAXWELL, J.

I concur in the views of Judge REESE, that the answer required by the statute is one raising issues of *fact* and not of law; in other words, the answer is what at common law was designated the "return to the writ." Prior to the statute of 9 Anne the return was not traversable, and the only remedy of the relator if it was false was an action for a false return. High on Ex. Rem., § 457, and cases cited. By the statute of Anne the plaintiff was permitted to traverse the return. The proper function of an answer or return is to show sufficient cause for failing to comply with the terms of the writ. The return should contain positive allegations of fact, and not mere inferences. *Co. Comms.*, 37 Penn. St., 237-277. *Gorgas v. Blackburn*, 14 Ohio, 252. *Society v. Com.*, 52 Penn. St., 125. *State v. Avery*, 14 Wis., 122. *People v. White*, 11 Abb. Pr., 168. The writ should state facts showing that the defendant is in default in the performance of a legal duty then due at his hands, and that the relator has a right to require him to perform such duty. If it fails to show such liability or right, a demurrer is the proper mode of raising the question. A mandamus in this country is a mere civil action, and the rules of pleading in other civil actions should be applied as far as possible in furtherance of justice. In my view a demurrer to the writ is not a return or answer within the meaning of the statute, and being overruled the defendant still may be permitted by the court to file an answer to the writ.

P. D. THOMPSON, PLAINTIFF IN ERROR, V. WILL E.
SHARP, DEFENDANT IN ERROR.

17	69
47	d1
48	909
17	69
54	82
54	298

1. **Judgment: VACATING: TRIAL.** In proceedings under sections 602 and 603 of the civil code to vacate a judgment rendered at a previous term of court, if errors of fact are alleged issue may be joined and a trial had. In such case the court must first pass upon the grounds to vacate the judgment. If sufficient is shown, the court must next enquire into the cause of action or defense. Both issues being found in favor of the petitioner, the judgment should be vacated and a new trial granted, but not otherwise.
2. ———: ———: ———. In case the defendant in such proceeding, being in court and resisting the application, fails to controvert the allegations of fact in the petition they should be treated as admitted, and if sufficient is alleged to warrant the vacation of the judgment it is not error for the court to decide the matter upon the facts so alleged and admitted to be true without the formality of a trial.
3. ———: CONSTRUCTION OF STATUTE. The provisions of section 318 of the civil code are not applicable to proceedings under sections 602-3 to vacate judgments rendered at a previous term of court. They are only applicable to the causes named in section 314, when the grounds there specified could not with reasonable diligence have been discovered before the adjournment of court.
4. ———: ———: PLEADING. The allegations of the petition for vacation of a judgment rendered at a previous term examined, and *Held*, Sufficient.

ERROR to the district court for Antelope county. Tried below before TIFFANY, J.

Thomas O'Day, for plaintiff in error.

R. S. Norval and *J. S. Bennett*, for defendant in error.

REESE, J.

This is a proceeding in error to the district court of Antelope county, by which it is sought to reverse the decision

of said court whereby a judgment of a previous term of court was vacated and a new trial granted. From the transcript of the record of the district court it appears that the defendant in error filed his petition alleging the principal facts constituting his cause of action in the original cause, showing that the action was for the possession of certain personal property detained by the defendant in the action, and showing the reasons why he did not appear in court and prosecute his cause, and that without his knowledge the defendant (plaintiff in error) caused the case to be tried in his absence and procured the judgment complained of. The leading facts plead as an excuse for not prosecuting the main case were, that the plaintiff in the case resided in York county, more than one hundred miles from the place of the session of court, and that it required two days by the usually traveled route to reach the place of trial. That the plaintiff by his counsel was present at the fall term of court in 1882, but that the case not being tried they returned after making an agreement with the clerk of the court by which they were to be advised by him of such orders as might be made in reference to the time for the future terms of court, calling of juries, etc.

The time for holding the next term of court was afterwards fixed by the then judge for a day certain in the month of March, 1883. On the eighth of February, 1883, the same judge made an order, which was entered of record, dispensing with a jury for said term of court. On the seventh day of March, the judicial district having been divided and another judge having been appointed—the new district containing Antelope county—an order was made adjourning the term until the 11th day of the following April. Of all these orders the clerk gave the promised notice. On the twenty-first day of March the judge made an order requiring a jury to be drawn for the trial of causes at said term, but of this order no notice was given the plaintiff (defendant in error) by the clerk. The petition further

alleges that a jury trial was never waived by either of the parties, that the clerk was indisposed and by reason of ill health unable to attend to his ordinary duties, and failed to notify the plaintiff" or his attorneys. The plaintiff, relying upon the former order of the judge dispensing with a jury, did not attend court, and in his absence the judgment for the defendant was rendered. To this petition no answer was filed. The record of the district court recites that, "the cause came on for hearing on the petition of the plaintiff for a new trial, and there being no pleadings filed for defendant, and no evidence offered or introduced by either party, and after the argument of counsel" the petition was granted and the judgment was vacated and set aside.

The first question presented is one of practice. Proceedings of this kind must be brought under the provisions of sections 602-3 of the civil code, and if the grounds are those mentioned in section 603 a petition must be filed and a summons must issue unless waived by the opposite party. "If errors of fact are alleged, an answer may be filed as in other cases." Maxwell's Pleading and Practice (1883), 730. The court must then try and decide upon the grounds to vacate the judgment, and if sufficient is shown the validity of the defense or cause of action must be next enquired into. Sec. 605, civil code. If both are found in favor of the petitioner the judgment must be vacated. These formalities were not observed in the hearing below, and plaintiff in error insists the proceedings were erroneous. If not erroneous they were clearly irregular, but we fail to see how plaintiff in error can insist upon the error since he failed to controvert the allegations of the petition and presented no issue to be tried. He contends that this was unnecessary, and cites section 818 of the civil code in support of his position, which provides that, "The facts stated in the petition (mentioned in the section) shall be considered as denied without answer." But we are at a loss to

see how this section can apply to the case at bar. It evidently refers to the provisions of section 314, and is applicable only when the grounds thus specified could not with reasonable diligence have been discovered before the adjournment of court. It has no reference to the cases mentioned in section 602. Since no issue of fact was formed upon which a trial could be had, the court did not err in deciding the matter without a trial, the plaintiff in error choosing to submit it on the petition alone.

The next question presented is, whether or not the facts stated in the petition are sufficient to entitle the defendant in error to the relief prayed for. The provisions of the third clause of section 602 are not available in this action for the reason that this clause is not referred to nor included in section 603, which gives the remedy of which defendant in error seeks to avail himself. But if such were not the case, we are satisfied that the neglect or mistake of the clerk referred to contemplates only the *official acts* of the clerk, and not what he may agree or promise to do as the agent or for the accommodation of parties who may have causes pending in court. The defendant in error must rely upon the seventh clause of the section referred to, which provides that a judgment may be vacated "For unavoidable casualty or misfortune preventing the party from prosecuting or defending."

From the petition we find that the clerk was, to the extent stated, the agent of defendant in error, and upon him defendant relied. That he at all times, as requested, notified defendant of the orders of the judge until the last order was made. That at that time, and after, the clerk "was indisposed, and was by reason of ill health unable to attend to his ordinary duties, and so neglected to notify" defendant in error or his attorneys of the making of said order, which otherwise he would have done.

The sickness of a party, or his family or his attorney, or of a material witness (when shown upon an unsuccessful

Holmes v. State.

motion for a continuance) have uniformly been held sufficient to justify a court in granting a new trial. *Horn v. Queen*, 4 Neb., 111, and cases there cited. The clerk being the agent of defendant in error, his sickness and inability to give the promised notice must be treated the same as though he had not been the clerk of the court. By his sickness, which was an unavoidable casualty or misfortune, defendant in error was prevented from prosecuting his cause. He was acting in entire good faith. The misfortune was beyond his control. The showing made by the petition of defendant in error being wholly uncontradicted, we cannot say the district court erred in vacating the original judgment and granting a new trial. Its order is therefore affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

CHARLES A. HOLMES AND JAMES C. REID, PLAINTIFFS
IN ERROR, V. THE STATE OF NEBRASKA, DEFEND-
ANT IN ERROR.

1. **Criminal Law: RECOGNIZANCE.** A criminal recognizance requiring a person who has been charged with the commission of a felony and held to bail by an examining magistrate to appear before the district court, on a day certain, to answer the charge preferred against him, is a sufficient compliance with section 307 of the criminal code, if the date fixed in the recognizance for the appearance of the accused is in fact the first day of the next term of said court.
2. ———: ———. A recognizance taken by an examining magistrate and signed by all the obligors, is sufficient and will bind all, whether their names are entered in the body of the same or not, provided it complies with the law in other respects.

3. **Demurrer.** A demurrer admits all allegations of the pleading to which it is made, and if an exhibit attached to a pleading is not "made a part" thereof, the pleading will yet be held good on demurrer, if the facts stated therein, including the giving of the instrument, are sufficient to constitute a cause of action.
4. **Recognizance taken by County Judge: SEAL NOT REQUIRED.** Where a county judge, acting as an examining magistrate, requires the accused to enter into a recognizance for his appearance at the next term of the district court, and such recognizance is given with sureties which are approved by such county judge, the endorsement of such approval upon the recognizance is not required to be attested by the seal of the county judge.

ERROR to the district court for Johnson county. Tried below before NORVAL, J., sitting for DAVIDSON, J.

Osgood & Harris, A. H. Babcock, and S. P. Davidson,
for plaintiffs in error.

William Leese, Attorney General, for the State.

REESE, J.

This action was originally brought in the district court against one Con. McGee, as principal, and plaintiffs in error, as sureties, upon a forfeited recognizance. Defendant in error filed its petition, by the district attorney, alleging substantially that a complaint had been filed before the county judge of Johnson county charging the said McGee with the crime of horse stealing; that a warrant was duly issued by the county judge for his arrest, and that he was arrested thereunder by the sheriff of said county and brought before said county judge, when a preliminary examination was had; that the county judge, after hearing the testimony, found there was probable cause to believe said McGee guilty of the crime charged, and he was ordered to enter into a recognizance in the sum of \$500 for his appearance "at the first day of the next term of the district

court to be held in and for Johnson county," and that said McGee and defendants entered into such recognizance. A copy of the recognizance is attached to the petition and identified as exhibit "A." The petition further alleges that said McGee was, by the grand jury of the next term of the district court of said county, duly presented, charging him with said crime, but that he failed to appear, and upon his default and the failure of plaintiffs in error to produce him, the recognizance was declared duly forfeited by said court and judgment of forfeiture duly rendered, etc.

To this petition plaintiffs in error demurred upon the grounds: 1. That the court had no jurisdiction of the persons of the defendants; 2. That there was a defect of parties plaintiff; and 3. That the petition did not state facts sufficient to constitute a cause of action. The demurrer was overruled. Plaintiffs in error refused to answer further, but elected to stand upon their demurrer. Subsequently the state dismissed the action as to McGee, and judgment was rendered against plaintiffs in error, who bring the cause into this court by proceedings in error for review.

The questions which are presented by plaintiffs in error will be noticed in their order. The first is, that the recognizance "required the appearance of the accused before the district court of said Johnson county on the 3d day of October, 1882," and not on the first day of the next ensuing term thereof as required by law, and that the recognizance is therefore void on its face, as it does not appear from the face of the recognizance that the third day of October was the first day of the term. The petition alleges that he was required to appear on the first day of the term of court next ensuing. The 3d day of October *was* the first day of the ensuing term. The court being in session could take judicial notice of the date of its session. While the law requires a defendant to be required to appear and answer to the charge on the first day of the next ensuing term (sec.

307, criminal code), yet we know of no law requiring the exact language of the statute to be followed in a recognizance. If he is required to appear upon a day which in fact is the first day of the term it is sufficient.

The next point presented is, that the recognizance was insufficient to constitute a cause of action against McGee and was dismissed as to him for that reason; that the recognizance upon its face only binds the sureties (plaintiffs in error) and does not bind the accused. The record fails to show why the action was dismissed as to McGee, but it *does* show that the dismissal was entered upon the motion of defendant in error after the overruling of the demurrer of plaintiffs in error. However that may be, the recognizance shows upon its face that he did sign it, the only objection being that his name was not written in the body of the instrument. It was not necessary that the names of any of the obligors should be so written.

"The character of the instrument, the obligation which the parties respectively assume, and their relation to each other are all apparent from a reference to its terms alone. There is no ambiguity or want of certainty in any essential particular," and the signatures of the obligors at the foot of the instrument were sufficient to render them liable thereon. *Stewart v. Carter*, 4 Neb., 566. McGee was liable on the face of the recognizance, and a judgment could have been rendered against him for the amount named therein.

It is next urged that the recognizance does not show upon its face that the officer before whom it was taken was the same officer before whom the preliminary examination was had, nor that the person before whom the recognizance was taken was authorized or empowered to take the same, nor that the official seal of the county judge was attached to it. To the first of these objections it must be answered that the petition alleges the fact and the demurrer admits it. As to the second, it appears to have been taken in

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Johnson county, before J. C. O'Connel, county judge, he being the county judge by whom McGee was held to answer.

As to the third objection, no seal was necessary. Had the recognizance been entered in the docket of the county judge it would have been sufficient.

It is next urged, that as the copy of the recognizance is not formally "made a part" of the petition, simply attached and referred to as "A," we must look to the petition alone for the statement of the facts necessary to constitute a cause of action. As the allegations of the petition have been substantially given, we need not repeat them here. They were sufficient. All the essential facts were alleged.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ROBERT J. GATLING, PLAINTIFF IN ERROR, V. W. C.
LANE ET AL., DEFENDANTS IN ERROR.

1. **Real Estate: TITLE: ADVERSE POSSESSION.** Where possession of real estate is taken under color and claim of title it is not essential to the claim of adverse possession that such title shall be valid. It is sufficient if the instrument purports to convey the title to the party in possession.
2. ———: **ADVERSE POSSESSION.** Open, notorious, exclusive adverse possession for ten years will vest a valid title in the occupant.

ERROR to the district court for Pawnee county. Tried below before DAVIDSON, J.

Harwood, Ames & Kelly and *J. L. Edwards*, for plaintiff in error.

17	77
17	269
18	625
21	683

17	77
25	641

17	77
27	63

17	77
33	570

17	77
37	354

17	77
38	678
38	854

17	77
48	952

17	77
49	377
50	517
53	158

17	77
60	97
60	732

A. H. Babcock, for defendant in error.

MAXWELL, J.

This is an action of ejectment brought by the plaintiff against the defendants to recover the possession of lot 12 in block 3, in Pawnee City. The defendants in their answer allege that on the fifth of February, 1869, said lot was duly sold to one C. C. Roberts, for the taxes due thereon for the year 1864; that in February, 1867, the treasurer of said county executed a tax deed to said Roberts, conveying to him the title to said lot, which deed was during the same month duly recorded; that Roberts thereupon "on the sixteenth day of February, 1869, entered into and took possession of said described premises under and by virtue of his said tax deed, and remained in the peaceable, continuous, exclusive, and uninterrupted possession of said premises under and by virtue of said tax deed aforesaid, and the title thereby conveyed, to the second day of September, A.D. 1869, when he sold and conveyed said premises for a valuable consideration to Wilson F. Street," etc., who took possession of said premises and continued in possession thereof until the second day of December, 1870, when he sold and conveyed the same to the defendants, who thereupon took possession under said deed, and have remained in the "peaceable, continued, exclusive, adverse, and uninterrupted possession of said premises, and have made valuable and lasting improvements of the value of \$2,000 thereon." The court below found the issues in favor of the defendants and dismissed the action. The plaintiff commenced the action on the twenty-seventh of April, 1882, so that the defendants themselves were in possession of the premises claiming as assignees of the grantee in said tax deed for more than eleven years before the action was begun. This the attorneys for the plaintiff admit, but claim that the tax deed under which the defendants hold

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is void upon its face, and this is the principal error relied upon.*

Where possession is taken under color and claim of title and continued for the statutory period, it is not essential that such title shall be valid. It is sufficient if the instrument purports to convey the title to the party in possession. *LaFrombois v. Jackson*, 8 Cow., 589. *Humbert v. Trinity Church*, 24 Wend., 587. *Northrop v. Wright*, 7 Hill, 476. *Munro v. Merchant*, 26 Barb., 383. The fact of possession and its character—the occupant claiming to be the owner of the premises, is the test. The possession must be inconsistent with the title of the true owner, and not subject to the rights of other parties. *Jackson v. Berner*, 48 Ill., 203. *Carroll v. Gillion*, 33 Ga., 539. *Thomas v. Bubb*, 45 Mo., 384. *Beaty v. Mason*, 30 Md., 409. When, however, an occupant has, as in this case, maintained actual, continued, and notorious adverse possession of real estate, claiming the same as his own against all persons for the full extent of ten years, he becomes the actual owner of the same, and the rights of the former owner are forever barred. *Horbach v. Miller*, 4 Neb., 32. *Stokes v. Berry*, 2 Salk., 421. *Graffius v. Totenham*, 1 W. & S., 488. It

* WM. A. BUTLER,
Co. Treas.,
to

C. C. ROBERTS.

} Filed for record Feb. 18th, A.D. 1869, at 10 o'clock A.M. Lots 1, 2, 3, 5, 6, in Block 14; Lots 4 and 5 in Block 10; Lots 7 & 12, Block 3; Lots 11 & 12 in Block 4; Lots 11 & 12, in Block 5, in Pawnee City, Neb.

Whereas, C. C. Roberts did, on the sixteenth day of February, 1869, produce to the undersigned, William A. Butler, Treasurer of the County of Pawnee, in the State of Nebraska, a Certificate of Purchase in writing bearing date the fifth day of February, 1867, signed by James B. Judd, who at the last mentioned date was Treasurer of said County, from which it appears that C. C. Roberts did, on the fifth day of February, 1867, purchase at Private Sale, sale in said County, the tract, parcel, or lots of land lastly in this Indenture described, which said Real Estate was sold to C. C. Roberts for the sum of Four & 71-100 Dol., that being the amount due on the following tract or lots of land returned delinquent for the non-payment of taxes, costs, and charges for the year 1864, to-wit:

Lots (1) & (2), (3), (5), (6), in Block (14); Lots 4 & 5, in Block (10); Lots 7 & 12, in Block No. (3); Lots No. 11 & 12, in Block No. (4); and Lots No. 11 & 12, in Block No. (5), all in Pawnee City.

And it appearing that the said C. C. Roberts is the legal owner of

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is unnecessary to consider the other questions in the case, as in our view the bar of the statute is complete in favor of the defendants.

The judgment of the court below is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAME V. SAME.

1. Tax Deed, though Void, Constitutes Color of Title.

A tax deed which purports to convey the title of real estate to the grantee constitutes color of title, although it may be void by reason of the failure to recite therein the place where the tax sale took place.

2. Adverse Possession. A party in the actual, open, notorious, exclusive, adverse possession of real estate for ten years thereby acquires the absolute right to the exclusive possession of the same.

said Certificate of Purchase, and the time fixed by law for redeeming the land therein described having now expired and the same not having been redeemed as provided by law, and the said C. C. Roberts having demanded a Deed for the tract of land mentioned in said Certificate, and which was the least quantity of the tract above described that would sell for the amount due thereon for Taxes, Costs, and Charges, as above specified; and it appearing that said lands were legally liable for taxation, and had been duly assessed and properly charged on the Tax book or duplicate for the year 1864, and that said lands had been legally advertised for sale for taxes, and were sold on the fifth day of February, 1867;

Now therefore, This Indenture made the sixteenth day of February, 1869, between the State of Nebraska, by Wm. A. Butler, Treasurer of said County of Pawnee, of the first part, and C. C. Roberts of the second part, Witnesseth, That the said party of the first part for and in consideration of the premises and the sum of One Dollar in hand paid hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, and convey unto the said party of the second part, his heirs and assigns forever, the tract or parcel of land mentioned in said Certificate and described as follows, to-wit:

Lots (1), (2), (3), (5) & (6) in Block No. (14), Lots 4 & 5 in Block (10), and Lots 7 & 12 in Bl. No. (3), Lots No. 11 & 12 in Bl. No. 4, and Lots 11 & 12 in Bl. No. (5), all in Pawnee City.

17	80
17	940
21	232
21	683
17	80
31	56
31	809
17	80
37	356
17	80
48	512
17	80
50	517
53	159
17	80
62	142

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3. ———: COLOR OF TITLE is not essential to adverse possession; but where a party does not enter under color of title his possession is limited to the premises actually occupied by him.
4. **Constitutional Law: AMENDING STATUTES.** The act to amend "the code of civil procedure," approved March 12, 1869, fixing the time within which an action for the recovery of the possession of real estate may be brought at ten years, is not in conflict with the constitution, and is valid.

MOTION for rehearing.

MAXWELL, J.

A motion for a rehearing has been filed by the plaintiff, accompanied by an elaborate brief, and as some of the questions raised were not discussed in the former opinion we will state our reasons for denying a rehearing.

1. The plaintiff alleges that the tax deed under which the defendants claim is void upon its face, and hence is not color of title.

To Have and to Hold said mentioned Tract or Parcel of land with the appurtenances thereunto belonging to the said party of the second part, in as full and ample manner as the said Treasurer of said County is empowered by law to sell the same.

In Witness Whereof the said Wm. A. Butler, Treasurer of said County Pawnee, has hereunto set his hand this the sixteenth day of February, A.D. 1869.

WM. A. BUTLER,

Attest: *Treasurer of Pawnee County, State of Nebraska.*
 LOU. C. DECOURDRES,
County Clerk.

In presence of
 J. F. C. MCCASLIN,
 E. A. FINN.

[U. S. Rev. Stamp.
 50 Cents Paid
 W. A. B. Feb. 16, '69.]

THE STATE OF NEBRASKA, } ss.
 PAWNEE COUNTY.

On this Eighteenth day of February, A.D. 1869, before me, County Clerk in and for said County, personally appeared above named Wm. A. Butler and acknowledged the execution of the foregoing conveyance to be his voluntary act and deed as such Treasurer; and I further certify that I know the said Wm. A. Butler to be the identical person described in and who executed the above deed as granted, and who is Treasurer of said County of Pawnee in the State of Nebraska.

In Witness Whereof, I have hereunto set my hand and Official Seal the date aforesaid.

LOU. C. DECOURDRES,
County Clerk, Pawnee County, Neb.

[SEAL.]

In *McKeighan v. Hopkins*, 14 Neb., 361, it was held that a tax certificate was not sufficient to constitute color of title. The reason is, a tax certificate does not purport to convey title. At the most, it is evidence that the holder or his assignor purchased the real estate described therein at tax sale, and that after the time for redemption has expired if the land is not redeemed the holder will be entitled to a tax deed. An instrument to create color of title must purport to convey the title to the grantee. It is not essential that it do so, however. *Bride v. Watt*, 23 Ill., 507. A tax deed which purports to convey the title to the grantee is sufficient color of title under which open, notorious, exclusive, adverse possession for ten years will operate as a bar, and this, too, although on its face it may fail to recite the place of sale. *McGinnis v. Edgell*, 39 Iowa, 419. *Colvin v. McCune*, Id., 502. *Sutton v. Stone*, 4 Neb., 319. *Rivers v. Thompson*, 43 Ala., 633. *Elliott v. Pearce*, 20 Ark., 508. And as the defendants have been in the open, continued, and exclusive adverse possession of the premises in question for more than ten years under claim and color of title, the action of the plaintiff is barred. *Grant v. Fowler*, 39 N. H., 101. *Farrar v. Fessenden*, Id., 268. *Elliot v. Pearce*, 20 Ark., 508. *Cofer v. Brooks*, Id., 542. *St. Louis v. Gorman*, 29 Mo., 593.

2. But even if the defendants entered and retained possession of the premises without color of title, still the action is barred. A person who enters upon the land of another with the intention of occupying the same as his own, and carries that intention into effect by open, notorious, exclusive adverse possession of the premises for ten years, thereby dispossesses the owner; and this is so whether the entry and possession are contrary to the will of the owner or not, if the occupant denies the owner's title and claims the land as his own. *Hamilton v. Wright*, 30 Iowa, 480. *Close v. Samm*, 27 Id., 503. *Solberg v. Decorah*, 41 Id., 501. *Yetzer v. Thoman*, 17 O. S., 130. *Towle v. Ayer*, 8 N. H.,

57. *Melvin v. Proprietors*, 5 Met., 15. *Brown v. King*, 5 Id., 173. *Poignard v. Smith*, 6 Pick., 172. No color title is necessary to constitute an adverse holding. *Campau v. Dubois*, 39 Mich., 274. But one entering upon lands adversely, without any deed or color of title, is restricted to the land actually occupied by him, and is not entitled to go beyond the limits of his actual occupation. *Colburn v. Hollis*, 3 Met., 125. *Jackson v. Schoonmaker*, 2 Johns., 234. *Hale v. Glidden*, 10 N. H., 397. *Ferguson v. Peden*, 33 Ark., 150. *Wilson v. McEwan*, 7 Oregon, 87. *Schneider v. Botsch*, 90 Ill., 577. *Foster v. Letz*, 86 Ill., 412. *Wells v. Jackson Mfg. Co.*, 48 N. H., 491. Wood on Lim. of Actions, 514. It is impossible to harmonize the cases relating to possession without color of title. Many of the older cases, when the statute of limitations was looked upon with disfavor and regarded as a statute of presumptions, seem to hold that to constitute a valid and effectual adverse possession, the possession must have commenced under color of title. Tyler on Adverse Possession, 859, *et seq.*, and cases cited. The statute is now held to be a statute of repose, which is available against the enforcement of stale demands. *Mayberry v. Willoughby*, 5 Neb., 368. The effect of the statute is to quiet titles to real estate, by fixing a time within which the actual owner must commence his action for the recovery of the estate. If no action is commenced within the statutory period the occupier obtains an absolute right of exclusive possession of the premises, not only against the former owner but all the world. *Trim v. McPherson*, 7 Coldw., 15. *Abeel v. Harris*, 11 G. & J., 367. *Cooper v. Smith*, 9 S. & R., 26. And this rule will apply as to the land actually occupied—if the possession was adverse, whether the party held under color of title or not. As the defendants in this case were in actual adverse occupation of the entire lot for more than ten years before the commencement of the action, the action to recover possession of the lot in question is barred.

3. In November, 1858, the code of "civil procedure" became a law in this then territory, to take effect on the first day of April, 1859. The act had a proper title, and the code as then adopted is in substance our present one. In 1866 the laws were revised, and all the general laws embodied in one bill and passed by the legislature as one act, and is known as the Revised Statutes of 1866. In this revision the code is designated "The Code of Civil Procedure." In *Miller v. Hurford*, 13 Neb., 17, 18, and 19, the question of titles of amendatory acts is considered, and it was held that the title of an act was not obnoxious to the constitution because it was to amend certain sections (naming them) of an act (giving the title and date of approval by the governor). This form of title is not as definite perhaps as could be desired, but so long as the amendments are germane to the act amended no court would be justified in holding them void. Within the limits fixed by the constitution, the legislature has the right to select such title to an act as may seem to it right and proper, and it is only when these limits are transcended that the court will declare the act unconstitutional. The amendment in this case, although general in its terms as applicable to the code, is not void. It reduced the time within which an action for the recovery of real estate may be brought to ten years, and this provision is valid and of full effect. The plaintiff's cause of action is therefore barred. A rehearing must be denied.

MOTION DENIED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. J. G. MILLER, V.
BOARD OF COMMISSIONERS OF LANCASTER COUNTY.

1. **Constitutional Law: TITLE TO ACT.** Where the title of an act contains two subjects, the first and principal one being the amendment of another act, and the second not connected with the principal subject, the first title and subject matter thereunder will be sustained where they are distinct and separate, if it is apparent that the second was not an inducement to the legislature to pass the first, so that but for the second part it would not have passed the act.
2. ———: **AMENDING AND REPEALING STATUTES.** A provision in an amendatory act repealing an act not connected with the subject of the amendment is void.

ORIGINAL application for mandamus.

Harwood, Ames & Kelly and *Marquett, Dewees & Hall*,
for relator.

Walter J. Lamb, for respondents.

MAXWELL, J.

In January, 1884, the relator applied to this court for a peremptory writ of mandamus to compel the defendants to include in the estimates of taxes to be levied for that year a sufficient amount to refund the taxes paid by him on certain school lands which he had purchased, the title to which remained in the state. An alternative writ was issued, to which the defendants filed an answer. The case was referred to a referee, who heard the testimony and found the facts. In consequence of the necessary delay in the several steps of the proceedings, the case was not ready to be presented to this court for final adjudication until after the time fixed by law for making estimates of the taxes to be levied for the year 1884 had elapsed, hence it was not then considered.

17 85
19 323
21 657
24 591

17 85
25 460

17 85
30 854
30 859

17 85
37 347

17 85
39 685

17 85
46 73

17 85
48 65
48 877

17 85
52 217
52 335
52 631
53 525
53 759

17 85
59 427
59 434

17 85
60 427

17 85
61 627

The act authorizing the repayment of taxes paid upon school lands, the title of which was in the state, was held to be constitutional in *Washington County v. Fletcher*, 12 Neb., 357, and *State v. Lancaster County*, 13 Id., 523, and need not now be considered. The principal ground of defense in this case is the repeal of said act.

In 1883 an act was passed, the title of which is as follows: "An act to amend an act entitled an act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes and for the investment of funds arising from the sale of such lands, being article I., chapter 80, Compiled Statutes. *Also to repeal article three of said chapter 80.*"

The whole purpose and tenor of the act relate to the sale and leasing of school lands and the disposition of the funds arising therefrom. Article three of chapter 80 is no part of the act amended, nor does it relate to subjects embraced either in the original act or as amended. The only reference to article 3, chapter 80, in the body of the act, is in the last section thereof, and is as follows: "That an act entitled an act to provide for the registry, sale, leasing, and general management of all lands and funds set apart for educational purposes, and the investment of the funds arising from the sale of such lands, approved February 19, A.D. 1877, being article I., chapter 80 of the Compiled Statutes, *and also article III. of said chapter 80 is hereby repealed.*" The attorneys for the relator claim that the House Journals show that the house of representatives in 1883 refused to repeal article III., chapter 80, as an independent measure, the vote being 56 against and 42 in favor of such repeal.

This is not denied by the defendants, and may be considered as admitted. It is pretty clear, therefore, that the legislature was imposed upon, and article III., chapter 80, included in the repealing clause of the amendment referred to, as though it had been a part of the statute amended. It had no connection with it, however.

The rule is well settled that where the title to an act actually indicates, and the act itself actually includes, two distinct objects, where the constitution declares it shall embrace but one, the whole act must be treated as void, from the manifest impossibility of choosing between the two and holding the act valid as to one and void as to the other. *Cooley's Const. Lim.*, 147. But this rule will apply only in those cases where it is impossible from an inspection of the act itself to determine which act or rather which part of the act is void and which valid. Where this can be done the rule does not apply, unless it shall appear that the invalid portion was designed as an inducement to pass the valid, so that the whole taken together will warrant the belief that the legislature would not have passed the valid part alone. The valid portion of the act in the case under consideration is separate and distinct from that which is invalid, and it is very clear that the invalid portion did not have and could not have had the effect to induce the legislature to pass the amendment in question, and therefore the amended act is valid. The second subject was evidently an attempt to accomplish by indirection what the legislature had refused to do by express enactment. That portion of the act, therefore, by which it was sought to repeal the act which took effect Feb. 20th, 1879, for the repayment of taxes levied on lands the legal title of which is in the state is not repealed. Except where a statute is amended, and the statute as it existed prior to the amendment repealed, a law not connected with the subject of the act amended cannot be repealed by a provision in the nature of a rider upon an independent act. The attempted repeal is therefore a nullity. A peremptory writ will issue as prayed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	88
59	477
17	88
62	871

ISAAC N. TAYLOR, APPELLANT, V. ROBERT WILSON AND
OTHERS, APPELLEES.

1. **Officers: PRESUMPTION AS TO OFFICIAL ACTS.** The presumptions of law are in favor of the due performance of official duty by public officers, and until the contrary is made to appear it will be presumed that such officers have performed the duties enjoined upon them by law.
2. **Constitutional Law: FAILURE OF PRESIDING OFFICER TO SIGN BILL.** The failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, does not affect the validity of the act. *Cottrell v. The State*, 9 Neb., 125.

THIS was an action brought in the district court of Antelope county, before TIFFANY, J., for the issuance of an injunction restraining the defendant Wilson, county clerk, and other county officers, from removing their respective records from Oakdale to Neligh, which had been declared the county seat of said county by virtue of a special election held therein Oct. 2, 1883, under the provisions of art. III., chap. 17, Compiled Statutes. A temporary injunction was allowed, but on final hearing dissolved, and judgment rendered dismissing the case at the costs of plaintiff. The plaintiff appeals.

D. A. Holmes, for appellant.

Thos. O'Day and *N. D. Jackson*, for appellees.

REESE, J.

There is but one question presented by the brief of appellant in this cause, and that is the alleged unconstitutionality of the act entitled, "An act to provide for the relocation of county seats," approved February 24th, 1875, Laws of 1875, 159.

The contention on the part of the appellant is, that the act in question was not signed by the president of the senate in the presence of the senate, as required by section 20 of art. II. of the constitution of 1866, that constitution being in force at the time of the passage of the act.

By an inspection of the journals of the senate and house of representatives of the session at which this act was passed, it will be seen that the bill for the act originated in the house and was designated as "House Roll No. 229." The senate journal shows, at page 497, that the bill was passed in due form, receiving the requisite number of votes, but the record fails to disclose the fact that the act after its passage was publicly signed by the presiding officer of the senate, as required by the section of the constitution above referred to. An inspection of the original bill on file in the office of the secretary of state discloses the further fact that the bill was in fact signed, or rather that it has the signature of the president of the senate properly attached.

It is a familiar rule of law that all presumptions are in favor of the due performance of the duties of officers, and that until it is shown that an officer has failed to discharge a duty enjoined upon him by law it must be presumed that he has performed it. The act is properly signed by the proper officer. The records of the senate show that it was properly passed, and that House Roll No. 229 was publicly signed by the president. The mere fact that a wrong title was given by the secretary of the senate to the act signed, would not be sufficient to rebut the presumption that House Roll No. 229 was the act signed. And especially is this true since the bill referred to by title was not in fact passed.

While we think the senate journal sufficiently shows that the act in question was in fact signed by the president of the senate, yet it has been held by this court in *Cottrell v. The State*, 9 Neb., 125, that the failure of the presiding officer of the senate to sign a bill which was duly passed

by the senate and afterwards approved by the governor did not affect the validity of the act, and in the opinion written by MAXWELL, CH. J., it is said that, "The signature of a presiding officer to a bill is a mere certificate to the governor that it has passed the requisite number of readings, and been adopted by the constitutional majority of the house over which he presides. * * * And when it appears from the journals that a bill has passed by the requisite majority, and has been approved by the governor, the failure of the presiding officer to affix his signature thereto will not invalidate the act, as it will be presumed that the governor had sufficient evidence before him of the passage of the bill at the time he approved the same." Applying this rule to the act in question, the inquiry as to whether or not it was signed becomes an unimportant one, as the act unsigned "is of the same validity as though signed by the presiding officer of the senate." *Id.*

It follows that the decision of the district court holding the act constitutional was correct, and is therefore affirmed.

JUDGMENT AFFIRMED.

WHITNEY, CLARK & Co., PLAINTIFFS IN ERROR, V.
WALTER CHAMBERS, DEFENDANT IN ERROR.

Statute of Limitations: PAYMENT BY ASSIGNEE OF INSOLVENT. The payment of a dividend by the assignee of an insolvent debtor is not such a part payment as will, under section 22 of the code, take the residue of the debt out of the statutory limitation, as against such debtor.

ERROR to the district court of Hamilton county. Tried below before GEORGE W. POST, J.

J. H. Smith, for plaintiff in error, cited: *Letson v.*

Kenyon, 1 Pac. Rep., 562. *Sornberger v. Lee*, 14 Neb., 193.

Austin J. Rittenhouse, for defendant in error, cited: *Stoddard v. Doane*, 16 Ohio State, 566. *Pickett v. King*, 34 Barb., 193. *Angell on Limitations*, 249. *Winchell v. Hicks*, 18 New York, 567. *Roosevelt v. Marks*, 6 Johns. Ch., 266. *Marienthal v. Mosler*, 16 Ohio State, 566.

COBB, CH. J.

There is but one question presented by the record in this case. The action in the court below was brought on two several promissory notes, one of which became due sixty and the other ninety days after the twenty-fifth day of January, 1877. The action was brought on the seventh day of October, 1882. So that upon their face the notes were barred by the statute, full five years having elapsed after the maturity of the notes when the action was brought. But upon the back of each of said notes appear two endorsements, one of \$34.50, the twentieth of April, 1878, the other of \$6.90 the ninth of October of the same year, which endorsements were alleged in the petition to have been made for money paid on the said notes by the duly appointed and acting assignee of the defendant, by virtue of his power and duties as assignee. There is also attached to the said petition and made a part thereof, a copy of a deed of assignment from the defendant to one Delevan Bates of a certain stock of goods, village lot, etc., for the benefit of his, the said defendant's, creditors, a list of whom were therein given, including plaintiffs and the payees of the said notes.

NOTE.—To take debt out of the statute there must be an unqualified acknowledgment of and promise to pay it; promise by one joint debtor will not take debt out of statute as to others, unless he is specially and severally authorized. *Mayberry v. Willoughby*, 5 Neb., 370. Promises and payments held not to take debt out of statute. *Kyger v. Biley*, 2 Neb., 22. *Johnson v. Ghost*, 11 Neb., 418. *Stevenson v. Craig*, 12 Neb., 469.—REF.

There was also contained in said petition a third cause of action, consisting of a book account, the last item of which was dated September 20, 1877, and which contains two credits of cash from said assignee, of dates respectively April 20 and Oct. 9, 1878. The defendant filed a general demurrer to the petition, which was sustained by the court, and this is the sole error upon which the cause is brought to this court.

Section 22 of our code provides that, "In any cause founded on contract, when any part of the principal or interest shall have been paid * * * an action may be brought in such case within the period prescribed for the same after such payment." So the question presented for our determination is, whether a part payment made by an assignee of the debtor, under the power of a general assignment for the benefit of creditors, will have the same effect under this section as a payment made by the debtor himself.

Under a statute like our own, the supreme court of Ohio, in the case of *Marienthal v. Mosler*, 16 Ohio St., 566, held that the payment of a dividend by the assignee of a debtor did not take the residue out of the statute of limitations. The opinion cites the cases of *Stoddard v. Doane*, 7 Gray (Mass.), 387, *Pickett v. King*, 34 Barb., 193, and *Roosevelt v. Marks*, 6 Johns. Ch., 266. While it cannot be said that the argument is all on the side of the above cases, and there are high authorities holding the other way, yet I think that the weight of reason as well as of authority is with them.

Counsel for plaintiff in error cite, with evident confidence, the case of *Sornberger v. Lee*, 14 Neb., 193. In that case the court held that, "The receipt and endorsement on a promissory note, by the holder, of money realized from a collateral left with him by the maker for that purpose, will remove the bar of the statute." But the chief contention on the part of the plaintiff in error in that case was, that the "mere payment of a part of a debt was not sufficient to

stop the running of the statute." The court held that it was sufficient, and that the facts in that case as set out in the petition (the case having been disposed of in the court below on demurrer to the petition) as follows: "That on the thirtieth day of January, 1877, the plaintiffs collected \$61.55 on a note which defendant had left with them as collateral security to the note above described, and on the same day made the endorsement as above set forth," were sufficient to constitute a part payment under the statute.

As I understand the reasoning of the cases upon the section of the statute under consideration, it amounts to about this, that a part payment in order to bar the statute must be equivalent to an acknowledgment of an existing liability or to a promise to pay the same. If such is the logic of the statute, then I think there is a wide difference between the part payment in the above case and that in the case at bar. There the application was made pursuant to the present special authority of the debtor, by an agent appointed for that purpose. Anything else which the agent was authorized to do, to-wit, to collect the money on the collateral, was a mere incident to the application of it on the note. Here the application of any portion of the property to the part payment of the notes and account sued on was not necessarily or probably in the mind of the defendant in error when he made the assignment for the benefit of his creditors. The main object of the defendant in error in making the assignment was to place the legal title and possession of the assigned property in his assignee, to the end that it might be fairly and equally distributed among his creditors, in proportion to their respective demands, and any payment on the notes and account of the plaintiffs in error was a mere incident to said assignment and the trust thereby created. And as it appears to me, the payments made by said assignee on the said notes and account were made as the agent of the law and of the said creditors rather than as the agent of the said assignor.

For all that appears on the face of the deed of assignment attached as an exhibit to the petition in the case at bar, it was not in the mind of the assignor when he made the assignment that the property would pay less than the whole of the demands of his creditors named in the schedule, so that it cannot be said that he contemplated the making of part payment on the notes or account sued on.

Since writing the above my attention has been called to the case of *Letson v. Kenyon*, 31 Kan., cited by counsel for plaintiff in error from the Pacific Reporter, which work not being in the library the case was not sooner examined. While that able court came to a different conclusion, I do not see sufficient reason in their opinion to reconsider the views above expressed.

I therefore reach the conclusion that there was no error in sustaining the demurrer to the petition. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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21 - 187

CHARLES C. HOUSEL, PLAINTIFF IN ERROR, V. GEORGE H. BOGGS AND LEN W. HILL, DEFENDANTS IN ERROR.

Taxes: TAX DEED. A tax deed must be valid on its face to entitle the party claiming under it to the benefit of the special limitation of the revenue law. *Twale v. Holt*, 14 Neb., 221.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J. The action was one of ejectment brought by Boggs & Hill against Housel. They claimed title as grantees of the original owner of the lands in controversy. Housel claimed title under tax deeds

dated May 12, 1875, and April 19, 1876, with possession from 1875. The action was commenced in 1880.

John L. Webster, for plaintiff in error.

W. J. Connell, for defendants in error.

REESE, J.

The question presented by the record in this case is, whether or not the district court erred in excluding from the jury two tax deeds offered in evidence by the plaintiff in error. It is conceded that these deeds, failing to recite the place of sale, are void and do not carry with them the *constructive* possession of the property sought to be conveyed. But it is claimed by the plaintiff in error that as the proofs showed he had had *actual* possession since 1875—more than three years—and the defendants in error were out of possession, the bar of the statute of limitations has run in his favor. It is also claimed that the question now presented has not been heretofore determined by this court in the cases of *Sutton v. Stone*, 4 Neb., 319, and *Towle v. Holt*, 14 Neb., 221, and the plaintiff in error has sought to show the distinction, which in some respects has been made apparent.

The attorney for the plaintiff in error has presented a very able and exhaustive analysis of the law upon the subject as declared by text writers and the ultimate courts of other states and were the question now before this court for the first time the writer would be inclined to follow them, notwithstanding the peculiarity of our statutes upon the subject of taxation and the rights of holders of tax liens. But as the law of this state may be considered to have been settled since the decision of the case of *Sutton v. Stone*, in 1876, and the doctrine there laid down followed by subsequent cases, we do not feel inclined to again open the question and adopt another and conflicting rule, espe-

cially so since the holding in those cases is, in view of our statute, equitable and just to as full an extent, at least, as would be the rule contended for by plaintiff in error. Another reason why the decision in those cases should not now be overruled is, as stated by Justice MAXWELL in the opinion in the case of *Towle v. Holt*, it has "to some extent become a rule of property, and if changed at all it should be done by the legislature."

In *Sutton v. Stone*, LAKE, CH. J., in the opinion, quoted with approval the language used by the supreme court of Kansas in *Bowman v. Cockrill*, 6 Kas., 339, in which it is said: "It is only where the tax deed is good *prima facie*, and where on account of some irregularity in the tax proceedings, the deed is void, or, more properly speaking, is voidable if attacked, that the statute of limitations can apply."

In *Towle v. Holt*, this court said, where a party is in actual possession for the requisite length of time, under a tax deed which is on its face valid, "the court will not inquire into mere irregularities in the proceedings leading up to the tax deed. But if the deed is not in the form required by the statute, the invalidity appearing on the face of the deed, it is mere color of title under which a party must retain adverse possession for ten years to acquire an absolute title." This having been declared and accepted as the law of this state, we do not feel warranted in questioning its soundness. This would be our view, even though it were conceded, as claimed by plaintiff in error, that the case of *Sutton v. Stone* was not an authority upon which to predicate the decision of the case of *Towle v. Holt*.

It follows that the decision of the district court in sustaining the objection of defendants in error to the introduction of the tax deeds was correct.

The question as to whether the plaintiff in error is chargeable with rent from the date of the commencement of the action only, or from the date of the acquisition of ti-

Bedford v. Ruby.

tle by defendant in error (plaintiff in error being in possession of the premises at that time) is presented by the record, but not argued by counsel. The amount involved in this case is so small as to be of little importance to the parties. The question as to whether sections four and eleven of the act of 1883 [Laws of 1883, 249, Comp. Stat. 1885, chap. 63] are applicable to cases of this kind is therefore not decided.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

HENRY BEDFORD, PLAINTIFF IN ERROR, V. HENRY
RUBY, DEFENDANT IN ERROR.

1. **Jurisdiction: PRESUMPTION.** It is a rule of law that every presumption is in favor of the correctness of the decision of courts of general jurisdiction until the contrary is made affirmatively to appear. *Roehl v. Roehl*, 15 Neb., 655.
2. ———: **STIPULATION TO SUBMIT CAUSE: PRACTICE.** Where the district court has jurisdiction over the subject matter in dispute, and the parties by stipulation agree that the court shall finally decide all questions involved in the case and dispose of it upon its merits, such court will be held to have jurisdiction over the cause and the parties, and, in the absence of error being made to appear upon the record, the judgment will be upheld.

ERROR to the district court for Seward county. Heard below before SAVIDGE, J., sitting for NORVAL, J.

C. L. Lewis and *D. C. McKillip*, for plaintiff in error.

R. S. Norval, for defendant in error.

REESE, J.

The question involved in this cause was submitted to the district court upon a stipulation made by the parties by

which certain facts were agreed upon, and by which it was agreed that certain documentary evidence should be used upon the trial. A trial was had, and the district court, "after hearing the evidence and the argument of counsel," entered its finding of facts and of law and rendered its judgment.

It is now sought by proceedings in error to reverse the decision of the district court. There is no bill of exceptions in the record. Under the issues and stipulation the court could legally decide as it did, providing the evidence was sufficient to support the finding and judgment. It must be presumed it was. The presumptions are all in favor of the regularity of the proceedings of the district court. Error must affirmatively appear. *White v. Reke*, 11 Neb., 519. *Roehl v. Roehl*, 15 Neb., 655. *Stevenson v. Anderson*, 12 Id., 86. *Deroin v. Jennings*, 4 Neb., 100. *Frey v. Drahos*, 7 Id., 197.

It is next urged that the district court erred in assuming jurisdiction over the subject matter of the controversy, especially so since the proceeding was had upon a mere motion. The parties very properly appeared before the court, and without the expense and vexation of a long course of litigation submitted the matter in dispute for the judicial determination of the court. The contention was between creditors over certain money which had been realized by the sheriff upon a sale of property on execution in favor of one, while at the same time the other claimed to have an attachment lien on the property. A part of the stipulation is as follows: "For the purpose of determining who is entitled to the proceeds of the sale of certain personal property sold on execution issued out of this court in the above entitled cause of Henry Ruby vs. Peter Hennegin, the following facts are agreed upon, and said district court, exercising its equitable powers, shall determine whether the said proceeds belong to and shall be paid over to said Henry Bedford, or whether such proceeds belong to and

 Holmes v. Irwin.

shall be paid over to said Henry Ruby." Certain facts are agreed upon, and it is agreed that certain evidence shall be admitted, and the matter is thus submitted to the court. It had jurisdiction over the subject matter. After the stipulation was filed, if not before, it had jurisdiction over the parties. No error appearing of record, the decision must stand. The order and decision of the district court are affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN B. HOLMES, PLAINTIFF IN ERROR, V. ROBERT
IRWIN, DEFENDANT IN ERROR.

1. **Herd Law: JURISDICTION OF JUSTICE.** Under the provisions of the herd law of Nebraska, when proof of damage and the service of notice as provided by that law is filed with a justice of the peace, by the taker-up of stock, the issuance and service of summons are not necessary to give the justice jurisdiction to issue execution.
2. ———: ———: **JUDGMENT.** When jurisdiction in such case is acquired, the fact that the justice of the peace renders an illegal and void "judgment" will not destroy such jurisdiction, and the issuance of the execution and sale of the property will not be held to be void.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

S. P. Vanatta, for defendant in error.

REESE, J.

On the twenty-eighth day of January, 1884, a cow belonging to the defendant in error was taken up by the

plaintiff in error while trespassing upon his cultivated lands, and on the next day he notified the defendant in error in writing of the fact, and of the amount of damages and the name of his arbitrator. The notice was delivered to the wife of the defendant in error, and was received by him. No attention was paid to the matter by him, and on the fourth day of February the plaintiff in error filed the notice, with an affidavit of service, with the proper justice of the peace, who administered an oath to the plaintiff and enquired into the matter, and rendered judgment for the amount named in the notice. On the sixth day of February an execution was issued and placed in the hands of the sheriff, who levied upon the cow and sold her on the eighteenth day of February, and returned the execution and money to the justice of the peace.

On the twenty-second day of March the defendant in error filed his petition in error in the district court, alleging error as follows:

"1st. The said court erred in rendering up a judgment against the plaintiff. 2d. The court had no jurisdiction of this plaintiff or of the cause of action. 3d. No summons was ever issued in said cause against this plaintiff, nor was any summons ever served on him as provided by law, nor did this plaintiff have any notice of the pendency of said suit or appear therein. 4th. This plaintiff did not voluntarily appear in said cause for any purpose, and did not answer to the same in any way. 5th. This plaintiff did not have his day in court, and had no knowledge of the pendency or commencement of said suit. 6th. The court had no legal authority to render up said judgment or any judgment against this plaintiff."

Upon the final hearing in the district court the judgment of the justice of the peace was held to be null and void and without authority of law, and that said court had no jurisdiction of the person of the plaintiff. The judgment was set aside, adjudged to be void, and judgment was rendered

against the plaintiff in error for costs. The plaintiff in error now brings the case into this court for review.

It is a well settled rule of law that this court, in the exercise of its appellate jurisdiction, can only pass upon the questions submitted to the district court, hence we must look to the petition in error filed in that court for the questions there presented.

We think it can fairly be said that the only questions presented to the district court by the petition in error were that all the proceedings of the justice were void for the reasons: 1. That the justice had no authority to render any judgment in such a case. 2. That the justice was wholly without any jurisdiction, no summons having been issued or served, and no appearance having been made. And that no objection was made to the notice or manner of service relating to the damages and the fact of the taking up of the cow.

So far as the first of the above questions is concerned, we think the justice exceeded his authority in rendering a *general* judgment, but we cannot agree with the district court in holding that this excess of authority rendered all his proceedings void. By section four of the herd law, Compiled Statutes, chap. 2, art. III., a justice of the peace has the authority to receive and file proofs of damage and issue execution thereon. Conceding that he had no authority to render the judgment, yet it is quite clear to us that the act of rendering an illegal or void judgment would not destroy the jurisdiction which he had acquired by the filing of the proofs by the taker-up of the stock. He had authority to issue the execution for the sale of the impounded stock, but when that stock was sold and the proceeds of the sale properly accounted for, the authority of the justice over the parties or their property was at an end. Hence in this case the judgment is void so far as the deficiency is concerned. More properly speaking, the sale of the trespassing stock was a satisfaction of the execution which the jus-

tice had authority to issue. It was necessary and proper for the justice to enter the case upon his docket, giving a statement of the facts and history of all the proceedings including the issuance and return of the execution, but no formal judgment was necessary, the filing of the notice with proof of service having that effect under the statute.

As to the second proposition, no summons was required. By the act above referred to it was the duty of defendant in error, if he objected to the amount of damages claimed, to make it known by selecting his arbitrator for the assessment of damages. Failing in that, he is deemed to acquiesce in the amount claimed, and he cannot object thereafter. Any other construction of the law would destroy the purpose for which it was enacted—that of a speedy and effectual remedy for damage done by stock to cultivated lands and growing crops.

As nothing more can be claimed for the “judgment” of the justice than a *basis* upon which and from which to issue the execution, it follows that his proceedings in issuing the execution were not void, and that the district court erred in so holding. It also follows that the receipt and filing of the amount of damages, costs, etc., and the issuance of the execution thereon, was not such a judgment or final order as is contemplated by section 580 of the civil code, and which might be “reversed, vacated, or modified by the district court.”

The judgment of the district court is reversed, and the proceedings in error instituted in that court by the defendant in error are dismissed.

JUDGMENT ACCORDINGLY.

MAXWELL, J.

I concur in the judgment of reversal, but am unable to give my assent to some of the points decided.

First. Section 4 of the herd law provides that, “If the

owner of said stock shall refuse within forty-eight hours after having been notified in writing to pay said damages claimed, or appoint an arbitrator to represent his interest; said animal or animals shall be sold upon execution [order of sale] as required by law, when said amount of damages and costs shall have been filed with any justice of the peace of the county within which said damages may have been sustained."

Sec. 5. "In case the parties interested cannot agree as to the amount of damages and costs sustained, each party may choose a man, and in case the two men chosen cannot agree, they shall choose a third man, who, after being duly sworn for the purpose herein named, the three shall proceed to assess the damages, possessing for that purpose the *general power of arbitrators*."

Sec. 6. "The said arbitrator or arbitrators shall make an award in writing, which if not paid in five days after the award has been made may be filed with any justice of the peace in the same county, and shall operate as a judgment, which judgment shall be a lien upon the stock so taken up, and execution may issue upon said stock for the collection of said damages and costs as in other cases," etc.

In this case the person taking up the stock served a notice on the owner thereof of the amount of damages claimed and the name of the person selected by him as an arbitrator in case the amount claimed was unsatisfactory. As no objection was made by the owner of the stock to the amount of the claim, nor an arbitrator chosen by him for the purpose of ascertaining the damages, the amount claimed is deemed to be satisfactory. This case therefore falls within section four of the act, which does not declare it shall have the force of a judgment. At the most it is an admission of the amount of damages sustained. This, if not paid, may be filed with a justice of the peace, who may enforce the lien. To give the justice jurisdiction the proceedings must show the taking up of the stock, a copy of the notice

substantially in the form required by the statute, with proof of service of the same on the defendant, and that more than forty-eight hours have elapsed since the notice was served, and the defendant has failed to choose an arbitrator. These are jurisdictional facts which properly should be entered on the justice's docket, although no doubt the jurisdictional facts may be proved even if not so entered, there being no provision of the statute requiring them to be entered on the docket. The justice, however, is to enforce the lien upon the stock by requiring the stock to be sold. This certainly requires a judgment for the amount admitted to be due, and an order to sell the property. An order of sale or special execution will then be issued on the judgment to sell the impounded stock, and after the sale be returned to the justice. But suppose the authority is derived from section 6. It will be observed that only the *ordinary* powers of arbitrators are conferred upon the persons selected to appraise the damages. Their finding, therefore, is merely an award. No case has been cited, nor can one be found so far as I am aware, holding that an award is a judgment. It may be conclusive upon the rights of the parties, but it is not, like a judgment, the *sentence of the law*. This is admitted in the majority opinion, where it is said that the "receipt and filing of the amount of damages, costs," etc., is not a final order. I agree that it is not a final order, but it is the duty of the justice to make it so by the entry of judgment and order to sell the property, and to issue an order of sale thereon. Such procedure is clearly implied from the statute, and will protect the rights of the parties by enabling any one aggrieved by the proceedings to protect his rights, either by petition in error or appeal, which the procedure approved by the majority of the court fails to do. If stock can be taken up and by a summary proceeding sold, and the proceeds of the sale appropriated by the person taking up the stock, and the actual owner be denied the right of review, the result might be the perpetration of gross wrongs.

LOUIS TESSIER, PLAINTIFF IN ERROR, V. REED, JONES &
Co., DEFENDANTS IN ERROR.

1. **Pleading:** PETITION. A petition which alleges that the defendant is indebted to the plaintiff for a specific sum then due and payable, for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant, states a cause of action, although subject to a motion to make definite and certain.
2. **Attachment.** Affidavit for an attachment, *Held*, Sufficient.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

T. D. Cobbey and *J. E. Cobbey*, for plaintiff in error.

Burke & Prout, for defendants in error.

MAXWELL, J.

The defendants in error brought an action in the district court of Gage county to recover the sum of \$348. The plaintiff in error demurred to the petition upon the ground that the facts stated therein were not sufficient to constitute a cause of action. The demurrer was overruled, to which the plaintiff in error excepted, and as he elected to stand on his demurrer judgment was rendered against him in favor of the defendants in error for the sum of \$475.36.

The following is a copy of the petition, omitting the title and verification: "The plaintiff complains of the defendant and for cause of action says that there is now due and owing from the defendant to the plaintiff for goods, wares, and merchandise heretofore sold and delivered by the plaintiff to the defendant the sum of three hundred and forty-eight dollars. Wherefore the plaintiff prays judgment against the defendant for the sum of three hundred and forty-eight dollars and costs of suit."

1. This is the substance of the common count for goods

17	105
24	452
17	105
33	238
17	105
48	901
17	105
50	368
50	748
17	105
159	608
59	633

sold and delivered, and while open to the objection of indefiniteness, and therefore subject to a motion to make definite and certain, it is sufficient to show a liability of the defendant in favor of the plaintiff. The court did not err, therefore, in overruling the demurrer.

The judgment, however, is for a sum greatly in excess of the amount claimed in the petition, and it will be reversed unless the defendants in error remit the excess, in which case the judgment will be affirmed.

2. It is claimed that the court erred in refusing to discharge the attachment, the principal ground of error being that the affidavit for the attachment is insufficient. The following is a copy, omitting the signature and jurat: "T. F. Burke, being first duly sworn, deposes and says that he is one of the att'ys for the plaintiffs, and that the plaintiffs have commenced an action against one Louis Tessier, in the district court of Gage county, to recover the sum of three hundred and forty-eight dollars now due and payable to the plaintiff from the defendant upon an account for goods sold and delivered by the plaintiff to the defendant at his request; affiant further says that said claim is just, and that the plaintiff ought, as he believes, to recover thereon the sum of three hundred and forty-eight dollars, and that the defendant, Louis Tessier, is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors." This, while not as formal perhaps as could be desired, is sufficient to sustain the attachment. Judgment will be entered in conformity to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM MALONE, PLAINTIFF IN ERROR, v. HARVEY
J. HUSTON, DEFENDANT IN ERROR.

1. **Malicious Prosecution: EVIDENCE.** In an action for malicious prosecution growing out of a criminal prosecution before a justice of the peace, the complaint and warrant are competent evidence even though they are so unskillfully drawn as to be open to an objection, in the criminal proceeding, for informality, if a criminal act is charged therein.
2. ———: ———: When a complaint charges that a person, naming him, "has unlawfully and feloniously taken, stolen, and carried" the property "off," and in other respects sufficiently charging the crime of larceny, this will be held sufficient to sustain an action for malicious prosecution, where the party charged was arrested under a warrant issued upon such complaint, if the prosecution is shown to be malicious and without probable cause.
3. ———: **ARREST ON WARRANT.** Where a constable has a warrant for the arrest of a person charged with a crime, goes to him, informs him of that fact, reads the warrant to him, and informs him that he is under arrest, and the person thus arrested submits to the authority of the constable, agrees to go with him to the office of a magistrate for the purpose of trial, but by the consent of the officer goes to the magistrate's office alone and again submits himself to the custody of the officer and of the magistrate, procures an adjournment of the cause for a week and gives the necessary undertaking, with the required surety, for his appearance upon the day to which the cause is adjourned, and on that day appears for trial, this is a sufficient arrest and imprisonment upon which to base an action for malicious prosecution.

ERROR to the district court for Gage county. Tried below before BROADY, J.

A. Hardy, for plaintiff in error.

R. S. Bibb, for defendant in error.

REESE, J.

This action was originally instituted in the district court

of Gage county by defendant in error to recover damages sustained by him by reason of a malicious prosecution previously instituted by plaintiff in error against him before a justice of the peace of said county. The answer filed by plaintiff in error was a general denial of all the allegations of the petition. A jury trial was had, resulting in a verdict in favor of defendant in error for the sum of eighteen dollars. A motion for a new trial, made by the defendant in that action, was overruled, and judgment rendered on the verdict. He now prosecutes error in this court.

Plaintiff in error insists that the verdict of the jury is not sustained by sufficient evidence. The principal ground of this objection is, that neither the complaint made by defendant in error nor the warrant issued thereon charged a criminal offense.

While it is true that they were quite informal, and unskillfully drawn, yet it is equally clear that a criminal offense was charged—that of stealing corn of the value of seventy-five dollars. Plaintiff in error made this complaint before the justice, caused a warrant to issue thereon, carried the warrant to a constable and directed him to make the arrest. The recital of the warrant was, that defendant in error did, “in the county of Gage, take feloniously and stolen corn to the amount of seventy-five dollars from the said Malone.” For the purposes of this case this was a sufficient charge of the commission of a crime, and the district court did not err in admitting the complaint and warrant in evidence.

It is insisted that the statement of the facts and circumstances in the complaint, showing the manner in which the corn was alleged to have been stolen, show that it was not larceny. It is quite possible that the proof of those facts, improperly detailed in the complaint, might not sustain the direct charge of larceny also made, but that cannot aid the plaintiff in error. The essential allegations of a complaint or indictment for larceny are, that the party charged “did

Malone v. Huston.

steal, take, and carry away" the property named therein. These elements are all found in the complaint in the charge "that the said Huston has unlawfully and feloniously taken, stolen, and carried the same off."

It is next contended that defendant in error was not in reality arrested nor deprived of his liberty, and that therefore he was not imprisoned. The testimony shows that the constable went to the house of defendant in error, where he then was, read the warrant to him, and told him he was under arrest, or words of similar import; that defendant in error requested the officer to take him, or allow him to go, before another justice. The constable consented to this, and, as he had to subpoena the witnesses for the state, directed defendant in error to meet him at the office of the justice. Defendant in error immediately went there, going by way of a neighbor's whom he desired to become his surety. They met at the office of the justice that afternoon, and upon the application of defendant the cause was adjourned a week, he giving an undertaking for his appearance and thereby procuring his discharge. At the appointed time he again appeared for trial, with an attorney to conduct his defense, and upon his motion the proceedings were quashed and he was finally discharged. This was sufficient arrest and imprisonment.

A general objection is made to the instructions given to the jury upon the trial, but our attention is not called to any particular ones open to criticism. We have examined all, and see no good cause for complaint. The cause appears to have been fairly tried. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

110 SUPREME COURT OF NEBRASKA,

McLaughlin v. Sandusky.

17	110
17	345
19	175
17	110
32	339
17	110
38	268
39	497
17	110
40	791
41	84
41	419
17	110
47	287
17	110
454	378

DENNIS McLAUGHLIN, APPELLANT, V. WILEY SANDUSKY, APPELLEE.

- Trial: FINDING.** In cases tried to a court, without the intervention of a jury, the finding on questions of fact is entitled to the same respect in the supreme court on appeal as would be accorded to the verdict of a jury under like circumstances, and will not be interfered with unless clearly wrong.
- 2. Injunction: PUBLIC OFFICERS.** An injunction will not be granted to restrain an officer from the performance of an act official in its character, unless it be shown to the satisfaction of a court of equity that an injury has been or will be suffered by the plaintiff in the action.
- 3. Roads.** Under section 73 of the road laws of this state a road supervisor has authority to open a water-course from a road to a natural water-course. A pond is not such water-course.
- 4. Practice in Supreme Court.** Case examined, and there being sufficient evidence to sustain the decision of the district court upon questions of fact, the decision is affirmed.

APPEAL from the district court of Johnson county.
Tried below before BROADY, J.

V. D. Metcalfe and Babcock & Davidson, for appellant.

D. F. Osgood, for appellee.

REESE, J.

The plaintiff, being the owner of the south-west quarter of section ten in township five of range ten, in Johnson county, brought this suit in the district court against defendant, who was road supervisor of the district in which the land is situated, for the purpose of enjoining him from maintaining and continuing a ditch from an adjacent public highway on to his land. The pleadings and proofs show that the land of plaintiff is very low and somewhat marshy, and that a considerable portion of his land is cov-

ered by a pond, in which water stands during most if not all of the year. That the land is lower than much of the adjacent land on the west and north, and that in times of heavy rainfall or the melting of snow, much of the surface water from such lands is collected upon his land. There is a public highway along his west line which extends northward, and which is located through and over low, wet land. That in order to make the road passable it was necessary to grade it up above the water level, and in constructing such grade a ditch was cut along either side of the road. At a proper location near, and a little north of the north-west corner of plaintiff's land, a culvert was constructed across the road for the purpose of allowing the water accumulating in one of the lateral ditches to pass through into the other. Plaintiff alleges that the defendant cut a ditch along and near the north line of his land until said ditch came near the north end of the pond on his land, which reached near the north line, and then extended said ditch on to and across his land a distance of two rods, at which point the water from said highway and adjacent land was permitted to flow upon and over his land, increasing the size of the pond and inflicting a permanent injury to his farm. Defendant, while admitting the construction of the ditch, denies that plaintiff has suffered any damage, or that the flow of water has been in any degree increased by said ditch. Plaintiff claims that the water carried through the ditch is thereby diverted from its natural course and channel, while defendant as strongly contends that the ditch was so constructed as to follow the natural flow of the water which had no channel. These questions of fact were submitted to the court upon the proofs, and the finding was in favor of defendant. A decree was entered dismissing the action, and plaintiff appeals.

As we view the case the questions of fact presented by the pleadings and proofs are the controlling questions, and if the decision of the district court upon them cannot be

reversed it will be wholly unnecessary for us to examine the questions of law presented by the briefs and argument of counsel. If plaintiff is not injured by any act of defendant he is entitled to no relief.

On behalf of plaintiff the testimony of himself, David Mook, Jonathan Linford, Homer Greene, and William Campbell was taken, and each testified substantially that the flow of water on to plaintiff's land is greatly increased by the construction of the ditch, and a considerable quantity of plaintiff's land is overflowed which would not otherwise be. Upon the part of the defense the testimony of W. S. Dunlap, F. N. White, Mathew Brannen, E. D. Smith, S. L. Beatty, G. W. Harrington, and John Jones was taken, and each one as unequivocally testified that the flow of water was not increased by the ditch, and that the land of plaintiff was in no way injured thereby, but upon the other hand some testified it was an actual benefit—that the surface water which was collected upon the land over which the road was established had formerly ran where the ditch was made, but without any channel, and that the construction of the ditch served only to collect the flowing water into a channel, and to drain the excavations which had been made by the road side at the time the road was graded. If the testimony of these witnesses was true, it is clear that the plaintiff had no cause of action, and his petition was rightly dismissed. The testimony was submitted to the court and was sufficient to sustain its finding.

It is a well established rule of this court that the findings of inferior tribunals upon questions of fact will not be interfered with unless clearly wrong, and this rule applies to cases brought into this court upon appeal as well as upon error. *Armstrong v. Freeman*, 9 Neb., 11. *Richardson v. Steele*, Id., 483. *Cheney v. Eberhardt*, 8 Neb., 423.

Before an injunction can be granted in acts of this kind it must be made to appear to the satisfaction of a court of equity that substantial and positive injury has been or will

be suffered by the plaintiff in the action. Acts which are unauthorized but have no injurious effects constitute no grounds for relief by injunction. 1 High on Injunctions, § 9. *Rogers v. M. S. & N. I. R. R. Co.*, 28 Barb., 539. *Head v. James*, 13 Wis., 718. *Bank v. Fresno C. & I. Co.*, 53 Cal., 201. Pomeroy's Eq. Jurisprudence, § 1350.

During the trial in the district court it was shown that defendant appointed appraisers under the provisions of section 73, Comp. Stat., Ch. 78, for the purpose of appraising the damages caused to plaintiff's land by the construction of the ditch thereon, and the appraisers returned that plaintiff had suffered no damage. Under this appraisal defendant sought to justify the construction of the ditch. As the statute referred to only gives the supervisor authority to open a water-course from the road to a natural water-course, and as a pond is not such water-course, it is evident that he could not so justify. Had he opened the ditch or water-course through the land of plaintiff to the stream referred to by the witnesses, he perhaps could have done so.

For the reason that the proof shows that plaintiff is not injured by what has been done, the decision and decree of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE, EX REL. THE SCHOOL BOARD OF OMAHA, V.
ROGER S. GUTHRIE.

Mandamus: ABATEMENT. An application for a peremptory writ of mandamus against a sole incumbent of a city office will abate upon such incumbent ceasing to hold or occupy such office, except in cases where such incumbent may resign such office for the purpose of evading such writ.

ORIGINAL application for mandamus.

H. D. Estabrook and *E. W. Simeral* (*R. S. Hall* with them), for relator.

J. M. Woolworth, for respondent.

COBB, CH. J.

This is an application by the school district of the city of Omaha for a peremptory mandamus against the marshal of said city for the enforcement of one of the ordinances of said city, which makes it the duty of the city marshal, on the first day of each and every month, to ascertain and report to the city council, at its next regular meeting thereafter, the names of all persons or firms engaged in the liquor traffic, and the place of business of each, and whether licensed or unlicensed, and to notify any unlicensed liquor dealers to at once cease said traffic, and to make complaint against all persons selling liquor without license.

The respondent appeared in this court by counsel and demurred to the application by general demurrer, and on the fourth day of August, 1884, the same counsel filed in this court an affidavit that about six weeks before the said date the said respondent had resigned the office of city marshal of the city of Omaha into the hands of the city council, which thereupon accepted the same, and since that time he has not been, nor was he at the date of said affidavit, in the exercise of the said office, but that another person, to-wit, one Cummings, has been since the resignation of said respondent, and still is, marshal of said city, etc., and that said respondent did not resign the said office on account of this proceeding or for the sake of avoiding the same, etc. It has come to the official knowledge of the

NOTE.—Mandamus lies to compel judge to sign bill of exceptions after he is out of office. *State v. Barnes*, 16 Neb., 37.

court, in the course of other proceedings, that the facts stated in the said affidavit are true.

The question is thus fairly presented to the court—whether a case of mandamus against an officer of the government, state, or city abates upon the termination of the office of the officer against whom the writ was directed.

It cannot be denied that there is a sharp conflict of authority on this question. Whichever way we may be led to decide it, we will not be without the authority of respectable courts and well reasoned cases to sustain us. I do not think, however, that those cases where the writ of mandamus has been directed to courts or boards consisting of more than one officer or person can be considered as exactly in point. In such cases, while the judges, members, or officers may change, the court or board retains its identity, and is, in a sense, the same; and in case of a mandamus against a board of commissioners it has been held that it was unnecessary for the writ to issue against any person by name, but that “the relator might omit the names and proceed against the commissioners of the town, whoever they might be.” *The People, ex rel. Shuat, v. Champion*, 16 Johns., 60. See also *Pegram v. Commissioners*, 65 N. C., 114. This distinction has been often overlooked or denied by courts of the greatest respectability.

The case of *The State, ex rel. Sloan et al., v. Warner*, 55 Wis., 271, arose out of the refusal of Warner, who was secretary of state and ex officio auditor of public accounts, to audit and draw a warrant on the state treasury for the amount of the bill of Sloan and his partners, a firm of attorneys, for services in protecting the interest of the state in certain timber lands belonging to one of the trust funds of the state. One of the points presented on the part of the defense was, that at the time of the final hearing the term of office of Warner had expired, and his successor was in possession of the office, etc. A peremptory writ was issued, and in the able opinion of the court many cases are cited

where the respondents were boards of commissioners, and no notice is taken of the distinctions between those cases and one against a sole officer. While it will not be denied that this case is authority for the position taken by counsel for the relator in the case at bar, yet I think that the manifest justice of the relator's claim in that case, and the persistent and technical defense by which it was resisted went far toward controlling the court in its disposition. And the court but followed its own decision in the case of *The State, ex rel. Bushnell, v. Gates*, 22 Wis., 210. And it should not be forgotten that this latter case was one in which the remedy by mandamus was invoked to compel the levying of a tax to pay the interest on bonds, and so was one of a class of cases notoriously prolific of strained and doubtful law.

On the other hand, it has been held by the supreme court of the United States, in at least two well considered cases, that, in the absence of statutory provisions to the contrary, on the death or retirement from office of a sole original defendant in case of a mandamus to compel the performance of an official duty the writ will be held to abate. *United States v. Boutwell*, 17 Wall., 604. *The Secretary v. McGarrahan*, 9 Id., 298. These cases we are inclined to follow, as containing the more satisfactory construction of the law and less likely to lead to injustice than the other. It seems to be admitted in some of the opinions which hold that the writ does not abate that, in order to charge the defendant in the nature of contempt, it is indispensable that he should have personal notice of the proceeding, a proposition which is quite self-evident, and furnishes a strong illustration of the futility of issuing a writ containing a command which it is conceded may not be enforced.

It should be stated that no application has been made to the court to amend the papers in this case so as to make the present incumbent a party, nor has any notice been served on such incumbent to the knowledge of the court.

 Pereau v. Frederick.

The cause is therefore held to have abated, and its further consideration is dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

MARTHA P. PEREAU, APPELLEE, v. PETER FREDERICK,
APPELLANT.

1. **Deed: ACKNOWLEDGMENT.** A certificate of acknowledgment of a deed or mortgage is *prima facie* correct, and cannot be impeached except for fraud, collusion, or imposition.
2. ———: ———: **DESCRIPTION.** An officer taking the acknowledgment of a deed or mortgage cannot *after the execution* of the instrument change the description of the premises mortgaged or conveyed without the assent of the mortgagor or grantor, even to make the description conform to the contract as he understood it.
3. **Contract: EVIDENCE.** In a cross-action to require the execution of a mortgage, *Held*, That the agreement to execute it must be clearly proved.
4. **Principal and Agent.** Where an agent purchases a note and mortgage with notice of facts sufficient to put him on enquiry, the principal will be charged with such notice.
5. **Mortgage: ALTERING DESCRIPTION.** Where the description of mortgaged premises was altered without the assent of the mortgagor, after the execution of the mortgage, *Held*, That the mortgage was void even in the hands of a bona fide holder.

APPEAL from the district court of Richardson county.
Heard below before BROADY, J.

E. W. Thomas, for appellant, cited: *Palmer v. Windrum*, 12 Neb., 494. *Cake v. Peele*, 49 Conn., 483. *Young v. Darrell*, U. S. Supreme Court, 1883. *Huter v. Glasgow*, 79 Penn. State, 79. *Northwestern Insurance Co. v. Nel-*

17	117
31	860
17	117
35	490
17	117
52	613
17	117
59	98

son, 12 Rep., 161. *Fitzgerald v. Fitzgerald*, Id., 720. *Dolph v. Barney*, 14 Am. Law Reg., 748. *Washburn v. Roesh*, 13 Brad., 268. 6 Wait's Actions and Defenses, 472.

Frank Martin, for appellee, cited: *H. & M. v. Finch*, 3 Ohio State, 449. *Hodge v. Gilman*, 20 Ill., 441. *Montag v. Linn*, 23 Ill., 551. *VanHorn v. Bell*, 11 Iowa, 465.

MAXWELL, J.

In September, 1882, one L. E. Wood sold an alleged patent right to one Joseph H. Pereau, for the sum of \$750. To secure the payment of the same Pereau and wife executed a mortgage upon lots 1 and 2, in block 4, in Steele's addition to Falls City, and also upon the undivided half of lot 8, in block 58, in said city. The mortgage was afterwards changed by erasing the numbers "one" and "two," and inserting in lieu thereof "thirteen" and "fourteen," so that in the mortgage as changed the property is described as "lots thirteen and fourteen (13 and 14), in block four (4), in Steele's addition to Falls City, Neb.," being the homestead of Pereau and his wife. This action is brought by the wife of Pereau against Frederick, who had purchased the note and mortgage of Wood, to cancel the mortgage upon the homestead, for the reason that the description of said premises was fraudulently inserted, without her consent, in said mortgage, after she had signed and acknowledged the same. The court below found the issues in favor of the plaintiff, and rendered a decree declaring the mortgage on the homestead null and void, and canceling the same. The defendant appeals.

That the mortgage was changed is admitted, and the only question for determination is, whether the change was made before or after it was signed and acknowledged. It is contended on behalf of the defendant, and we think correctly, that the certificate of the officer taking the ac-

knowledge must stand against a mere conflict of evidence as to whether the instrument was voluntarily signed, acknowledged, and delivered or not, and cannot be impeached except upon proof which clearly shows it to be false and fraudulent. *Heeter v. Glasgow*, 79 Penn. State, 79. *N. W. Ins. Co. v. Nelson*, 12 Reporter, 161. *Fitzgerald v. Fitzgerald*, Id., 720. In the absence of proof of fraud and collusion on the part of the officer taking and certifying the acknowledgment of an instrument, the officer's certificate in proper form must prevail over the unsupported testimony of the grantor or mortgagor that the same is false and forged. *Fitzgerald v. Fitzgerald*, 12 Reporter, 721. *Gorham v. Anderson*, 42 Ill., 514. *Monroe v. Poorman*, 62 Id., 523. *Borland v. Walrath*, 33 Iowa, 130. *Van Orman v. McGregor*, 23 Id., 300. *Hourtunne v. Schnoor*, 33 Mich., 274. *Howland v. Blake*, 97 U. S., 624. In this case, however, the certificate is impeached by the testimony of the notary taking the acknowledgment. He testifies that he did not read the mortgage to the plaintiff, but stated its contents to her, and that it included the homestead. He then states: "I wrote them in in that way" (lots 1 and 2), "and afterwards, when my attention was called to the fact I had put in 1 and 2, I supposed it was a good faith transaction on the part of Pereau, and merely a mistake on his part, and when the deed was brought back to me, supposing it was a mistake of mine, I changed the numbers 1 and 2 to 13 and 14 myself, and Mrs. Pereau nor Pereau was not present when I made it."

On cross-examination he testifies as follows:

Q. What time was the mortgage brought back for correction?

A. I don't remember; I think the same afternoon, but I am not sure of that.

Q. Early afternoon?

A. I don't remember what time it was.

Q. Are you sure it was not after dark?

A. I cannot remember.

Q. Who brought it to you?

A. Wood.

Q. What did he say?

A. He said, "There is a mistake in this deed;" and I then went and got the plat and compared, and there was a mistake in the deed, and I supposed it was my error, as I supposed Pereau was in good faith giving the numbers, and I corrected it—or at least I changed it, whether you call it a correction or not.

He also testifies that the mortgage might have been filed for record in the county clerk's office when he made the alteration. Charles Loree, deputy county clerk, testifies that the instrument was filed for record on the evening of the 23d of September, 1882. He states: "Wood asked me to record it, and also asked me if it covered Pereau's property, and I told him it did not."

Q. It then covered lots 1 and 2 in block 4?

A. I told him it did not.

Q. What did he do then?

A. He asked me to wait half a minute, and he would have it corrected.

Q. How long did he have it out?

A. I think a few minutes.

Q. And brought it back in the condition it now is?

A. Yes.

One Niekirk, called as a witness for the defendant, testifies that he went with Wood to have the mortgage recorded about 8 or 9 o'clock in the evening of the day on which the mortgage was made; that Loree, the clerk, informed Wood that there was a mistake in the numbers of the lots; that "Wood spoke up and began to curse, and says he is going to have them made right, and to satisfy him Loree went and got the book and showed him he hadn't got the right numbers, and he took that note up and made the remark: 'I have paid them, and by — he's got to make

them right.' He mentioned Wardell (the notary's) name when he made the oath. He went away, and was gone from ten to fifteen minutes, and came back and said: 'By —, I have got them right,' and he put them on the record, and he paid Charlie for his trouble and we went home." The testimony of the plaintiff and other witnesses establishes beyond question that the alteration was made after the mortgage was signed and acknowledged, and without the plaintiff's consent. The court did not err, therefore, in declaring the mortgage null and void and setting it aside.

The defendant also filed a cross-petition praying for the execution of a mortgage on the plaintiff's homestead in case the mortgage executed September 22d, 1882, was canceled. To authorize such relief—a specific execution of an agreement—the contract must be clearly established. *Allen v. Webb*, 64 Ill., 342. *Lookerson v. Stillwell*, 13 N. J. Eq., 357. *Minturn v. Baylis*, 33 Cal., 129. *Reese v. Reese*, 41 Md., 554. *Wrigler v. Wrigler*, 31 Mich., 380. *Stanton v. Miller*, 58 N. Y., 192. *Bowman v. Cunningham*, 78 Ill., 48. *Martin v. Halley*, 61 Mo., 196. *Odell v. Morin*, 5 Oregon, 96. *Shropshire v. Brown*, 45 Ga., 175. This the proof fails to show, and the cross-petition was properly dismissed.

The defendant claims to be a *bona fide* purchaser before maturity of the note and mortgage, and therefore is entitled to protection. The proof upon this point clearly shows that the note and mortgage were purchased before maturity, at a large discount, and with full notice to the defendant's agent purchasing the same of the character of the transaction. But even if the defendant was a *bona fide* purchaser he could not be permitted to enforce a mortgage against the plaintiff which she never executed. The judgment of the court below is clearly right, and is in all things affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	122
34	487

17	122
480	453
60	454
60	572

LOYAL E. WHEELER, PLAINTIFF IN ERROR, V. MARTHA
A. WALDEN, DEFENDANT IN ERROR.

1. **Principal and Agent: SALE BY AGENT: SEAL.** The strict rule of the common law in regard to contracts under seal made by an agent for the sale or leasing of real estate, is not in force in this state—private seals being abolished. It is sufficient, if from the terms of the instrument itself, or any other matter therein, it appears that the parties intended it as the agreement of the principal and his name appear therein, however informally it may be signed by the agent.
2. **Landlord and Tenant.** A surrender of a lease by operation of law may be effected by any agreement between the parties that the term shall be terminated, which is unequivocally acted upon by both.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

J. E. Bush, for plaintiff in error, cited: *Mears v. Morrison*, Breese, 174. *Kersted v. Railroad*, 69 N. Y., 345. *Taft v. Brunter*, 9 Johns., 334. *Stone v. Wood*, 7 Cow., 451. 1 Wash. Real Prop., chap. 10, § 2. *Gartrell v. Stafford*, 12 Neb., 545. *Holland v. Hoyt*, 14 Mich., 238. *Kittle v. St. John*, 7 Neb., 73. *Allen v. Saunders*, 6 Neb., 443.

L. M. Pemberton, for defendant, cited: *Nutt v. Humphrey* (Kan.), 3 Pacific Rep., 787. *Butler v. Kaulbach*, 8 Kan., 668. *Walsh v. Barton*, 24 Ohio State, 28. Benj. Sales, § 219, 3d Amer. Ed. *Schuyler v. Leggitt*, 2 Cow., 660. *Koplitz v. Gustavus*, 48 Wis., 48. Wade on Notice, § 586.

MAXWELL, J.

This is an action to recover rent for certain premises alleged to have been leased by the defendant in error to

Wheeler v. Walden.

the plaintiff. The alleged lease is in writing, and is signed by D. A. Walden, agent, and the plaintiff.* The defendant below (plaintiff in error) filed an answer to the petition wherein "he admits that on or about the 20th day of March, 1880, he leased the premises mentioned in the plaintiff's petition *for the time and for the rental therein mentioned.*" Defendant admits that he took possession of said premises on or about March 20th, 1880, and that he abandoned the possession thereof on or about the 25th of March, 1881, and surrendered the premises to her and paid the rent in full. It is also alleged that no written lease was executed, the only one being by parol. On the trial of the cause in the court below the written lease was held to be valid, and the defendant in error recovered judgment.

* This agreement by and between M. A. Walden, of Beatrice, Gage county, Nebraska, of the first part, and L. E. Wheeler, of same place, of second part, witnesseth:

That for and in consideration of the rents and covenants herein-after made and reserved, said first party leases to second party for the term of three years, the following described premises and real estate in said county, viz.: the north-west quarter of the north-east quarter of section thirty-three (33), town four (4), range six (6) east, for the annual rent of three hundred dollars, to be paid quarterly; that is \$75 at the end of each three months during the term aforesaid. Said party is not to cut any standing timber, large or small, without first party's consent. Second party is not by himself, nor by animals, to injure any of the fruit trees growing on said premises in the orchard.

The second party agrees to pay the said sum of \$300 per annum for three years for the use and occupation of said premises, and that he will not cut any timber, large or small, on said premises without first party's consent. That he will not injure nor allow his animals to injure any of the trees in the orchard on said premises, and is to allow first party to put in the pasture on said premises, and keep summers and pasturing seasons a horse and cow free of charge. First party agrees to build a house on said premises 18x26 feet, one story and a half high, and a barn 18x24 feet, and bore a well, all to be done by the middle of March, A.D. 1880.

The term of this lease is to commence as soon as first party gets said house completed, so that second party can move into the same. It is further agreed by the parties hereto, that if second party fails to pay his rent as herein provided, or fails to keep and perform the covenants herein written for him to keep and perform at the times and in the manner herein provided, then and in that event, first party may declare this lease terminated, and may re-enter said premises without notice, and may remove second party therefrom without notice, on such failure.

Three questions are presented, which will be considered in their order.

First. Whether or not the lease in question is valid. The authority of the agent is not denied, in fact is admitted by alleging a surrender to him as a duly authorized agent. But it is said the lease is signed by the agent in his own name, and therefore is void by the statute of frauds. In regard to signing to take the case out of the statute, it is now well settled that the instrument to bind the principal need not be executed in his name as his act. It is sufficient if it appear that the party signing acts as agent in so doing, and with the intent to bind the third party as his principal. *Browne on Statute of Frauds*, § 364. *Kenworthy v. Schofield*, 2 Barn. & C., 945. *Williams v. Bacon*, 2 Gray, 387. *McWilliams v. Lawless*, 15 Neb., 132. *Dykers v. Townsend*, 24 N. Y., 57. *Salmon Co. v. Goddard*, 14 How., 447. *McConnell v. Bullock*, 17 Ill., 354. *Johnson v. Dodge*, Id., 433. *Morrill v. Clason*, 12 Johns., 102. There are many decisions rendered by courts having few equity powers upon sealed instruments, which have no application in this state where private seals are abolished, and the same tribunal administers law and equity. The strict rule, therefore, in respect to contracts under seal made by an agent, does not apply. It is sufficient, if from the terms of the instrument itself, or any other matter therein, it appear that the parties intended it as the agreement of the principal, and his name appear therein, however informally signed by the agent. *Randall v. Van Vechten*, 19 Johns., 60. *Dubois v. Delaware, etc., Canal Co.*, 4 Wend., 285. *Jackson v. Brown*, 5 Id., 590. *Barker v. Mich. Ins. Co.*, 8 Id., 94. *Fox v. Drake*, 8 Cowen, 191. *Stone v. Wood*, 7 Id., 453. *Perkins v. Wash. Ins. Co.*, 4 Id., 645. *Townsend v. Corning*, 23 Wend., 435. The lease in this case, while signed by Walden as agent, purports to be the lease of Mrs. Walden, and is sufficient to take the case out of the statute of

frauds. In *Morgan v. Bergen*, 3 Neb., 209, the contract was that of the alleged agent alone, and there was nothing tending to establish his agency.

Second. The defendant offered the deposition of one John Wood, wherein he testifies that in March, 1881, he heard a conversation between D. A. Walden and Wheeler in reference to leasing the house that Wheeler was then living in. Wheeler said he wanted to make it satisfactory and not have any trouble about it. "Dr. Walden said that would be all right and that he would cancel the lease." This was excluded. In excluding the deposition, we think the court erred.

A surrender by statute in England must be in writing, unless the tenancy is one that can be created without writing. Nor will an agreement to surrender for a particular purpose operate as a surrender if the purpose is not effected. *Berkley v. York*, 6 East, 89. *Comtail v. Thomas*, 4 M. & R., 218. *Ragor v. Wilson*, 6 Hill, 469.

In the case last cited the surrender was that of a deed, and it was held that it did not operate to revest the grantor with the title. A surrender by operation of law, however, may be affected by any agreement between the parties that the term shall be terminated, which is unequivocally acted upon by both. *Whitehead v. Clifford*, 5 Taunt., 518. *Phene v. Popplewell*, 12 C. B., 334. *Hall v. Burgus*, 5 B. & C., 333. *Bedford v. Terhune*, 30 N. Y., 453. *Witman v. Watry*, 31 Wis., 638. *Schieffelin v. Carpenter*, 15 Wend., 400. *Clemens v. Broomfield*, 19 Mo., 118. The court therefore erred in excluding the deposition, as the evidence of Wood tended to prove a surrender by operation of law.

Third. The court also erred in directing a verdict for the plaintiff.

The judgment of the district court is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

The other judges concur.

17	126
17	657
17	126
46	209
17	126
55	635

THE STATE OF NEBRASKA, EX REL. JOSEPH R. WEBSTER,
V. THE NEBRASKA TELEPHONE COMPANY.

1. **Telephone Companies: DISCRIMINATION NOT ALLOWED.**
When a corporation or person assumes and undertakes to supply a public demand, made necessary by the demands of the commerce of the country, such as a public telephone, such demand must be supplied to all alike without discrimination.
2. ———: ———: **TELEPHONE COMPANY IS PUBLIC SERVANT.**
Respondent is the owner of and is conducting a system of public telephone exchanges in Nebraska and Iowa, including in its circuit about fifteen hundred telephone instruments, supplied by it to that number of subscribers, upon the terms fixed by itself. Relator applied to be admitted as a subscriber and was refused. He tendered a full compliance with all the rules of the company. His place of business was accessible, no reason being shown why his request should not be granted. *Held*, That the telephone is a public servant in the commerce of the country, and that respondent having undertaken to supply the demand, must supply all alike without discrimination, and that having undertaken to supply the demand in the city of L., wherein relator resides, and being fully able to furnish him with a telephone instrument the same as its other subscribers, it was its duty to do so.
3. ———: **MANDAMUS LIES TO COMPEL FURNISHING OF INSTRUMENTS.** Telephone companies being common carriers of news, all persons are entitled to equal facilities in the enjoyment of the benefits to be derived from the use of the telephone, and where no good reason is assigned for a refusal by a telephone company to furnish a telephone instrument to a person who desires to become a subscriber, and tenders a full compliance with all the rules established for other subscribers, a writ of mandamus will issue to compel such company to furnish such person with the necessary instruments.

ORIGINAL application for mandamus.

J. R. Webster, pro se.

1. Mandamus is the proper remedy. .
People v. Throop, 12 Wend., 183. *People v. Gas Co.*,

45 Barb., 136. *Hobersham v. Canal Co.*, 26 Ga., 665. *People v. Troy R. R. Co.*, 37 How. Pr., 427. *Indianapolis v. R. R. Co.*, 37 Ind., 489. *Bartlett v. Medical Society*, 32 N. Y., 187. *Roehlen v. Aid Society*, 22 Mich., 86. *People v. Steele*, 2 Barb., 397. *Runkel v. Winemiller*, 4 Har. & J., 429. *U. P. R. R. Co. v. Hall*, 91 U. S., 343, 355, and many cases cited. *M. & O. R. R. Co. v. Wisdom*, 5 Hisk., 125. *Chicago R. R. Co. v. People*, 56 Ill., 366. The defendant is engaged in a public business. The business of telegraphing is a business of public employment of so high character that it is recognized as an *arm of commerce*, and as such coming within the regulating power of congress under the provisions of the federal constitution vesting congress with powers "to regulate commerce with foreign nations, and among the several states," and "to establish post-offices and post-roads." *Pensa. Tel. Co. v. W. U. Tel. Co.*, 96 U. S., 1. *Breeze v. U. S. Tel. Co.*, 48 N. Y., 132. *W. U. Tel. Co. v. Ferguson*, 57 Ind., 495. *Bartlet v. Tel. Co.*, 62 Me., 209. *Candee v. Tel. Co.*, 34 Wis., 471. Const. Neb., Art. XI., Sec. 3.

2. The telephone is a telegraph.

"The telegraph is a machine for communicating intelligence from a distance by various signals or movements previously agreed upon. The *Electro Magnetic Telegraph* is an instrument or apparatus for communicating words or language to a distance by the use of electricity." Web. Dic. *Telegraph*.

"Electro magnetic telegraph, an instrument or apparatus, which by means of wires conducting the electric fluid conveys intelligence to any given distance with the velocity of lightning." S. F. B. Morse, Web. Dic., *Electro Magnetic Telegraph*.

No more apt words than these in use in 1856, long before the invention of speaking telephones, could be now devised as a definition of the speaking telephone. They exactly and accurately describe the principle of action of

all electro magnetic instruments for conveyance of intelligence, and include *necessarily* every mechanical form of apparatus in which the *agent* electricity is used by the *means* of conducting metallic wire and apparatus, to accomplish the *object* of communicating words or language to a distance with the speed of lightning. To say these definitions were the perfect work of perfect *masters of language* would not be justice. They were *prophecy*. The foretelling of the possibilities and future development of telegraphy. The mechanical forms of the receiving and transmitting instruments may be varied ever so much. It may be a Morse instrument, a Vail printing instrument, an Edison quadruplex instrument, or a Bell or Edison speaking telephone. These are but different mechanical devices and forms to effect by one common agency and one common means, one common object. Generically they are the same. Specifically they differ, and the telephone is simply a specific or specialized form of telegraph. *Attorney General v. Edison Telephone Company*, 6 Law Rep., Queen's Bench Div., 244.

3. Common carriers of all kinds, and other public servants must exercise their several businesses with impartiality. *Chicago R. R. v. People*, 56 Ill., 365. Telegraph company must serve public indiscriminately. *W. U. Tel. Co. v. Furgeson*, 57 Ind., 495. *Chic. R. R. Co. v. People*, 26 Ill., 365. *State v. Telephone Co.*, 36 Ohio St., 296, 309. Nor can a state grant a monopoly in telegraphy for transmission of intelligence from place to place. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S., 1, 11. The duty to grant indiscriminate and impartial facilities to all citizens for transmission of intelligence is clearly the duty of telephone companies, as other telegraph companies, not merely by statute, but by principles of public policy. *State v. Telephone Co.*, 36 Ohio St., 296, 309.

4. Defendant contends, that the telephone system being its private property, it, like any owner of private property

may use, or refuse to use; grant the use, or refuse the grant, as he will, and it may refuse. The principle is correct, the error in the conclusion lies in the premise. *Aldrutt v. Inglis*, 12 East, 527. See also *Munn v. Illinois*, 94 U. S., 113. *Sickles v. Gas Co.*, 64 How. Pr., 33.

Thurston & Hall, for respondent.

Upon the facts and law in this case the defendant makes the following points:

(1.) The facts do not show a right in the plaintiff to have a telephone, even conceding his view of the law to be true.

(2.) Assuming it to be true that he has a right to have a telephone placed in his office by this defendant, still mandamus is not the proper remedy.

This company, defendant, under the proofs, is doing business with the general public by means of its public telephone at places conveniently situated. With certain individuals it also has special contracts for a term of ~~not~~ less than one year, payable monthly. The contract is in proof. The testimony as to such contracts shows that the ability of the company to make such special contracts is dependent upon many facts, which are incapable of arbitrary determination—the nature of electricity, the responsibility of the contracting party, the position of the applicant with reference to the wires already strung, etc., etc. Upon these facts we insist that were the defendant a public corporation subject to all the duties the possession of special privileges bring, and had we a statute enforcing upon it the duty to equally serve all parties, yet the court would hesitate long before establishing by mandamus a rule that, if carried out, must ruin any company subjected to it. Such duty is amply fulfilled when the company has placed for the public telephones for general use, to which any one may resort, and amply sufficient to accommodate

the public. The telephone company is not a public corporation. It has granted to it no special power or privilege. Under no right received from state does it have any special franchise. From no service has it any benefit conferred upon it that no other may enjoy, which renders it subject to any special law. And under no special law has any such duty been imposed upon it.

Surely as far as courts have gone in this matter they *will not* say that the regulation of business of a private corporation with a private individual by contract which is special to themselves, can without legislation be compelled by the courts. It requires some law making this duty to make this private contract for a year, else the right does not exist. If such a law were made by statute under the extreme rule of law carried to its utmost limit, marked by able dissenting opinions of eminent judges, that law would be unconstitutional. Here, without statute, they demand it. Is this all? What are the facts? They show that the defendant did give the plaintiff a telephone, did contract with him, did fulfill his contract, that disputes arose and plaintiff would not pay his rates, and that he notified the defendant that if they were not satisfied they could remove the telephone, and that thereupon they removed it, and that the plaintiff still owes the rates and is indebted for it, and now defies collection. Upon any principle of justice had there been a hundred rights to have the telephone, there is none now. Upon this question taken in the best light for the plaintiff, a disputed one, he demands of this court's hands a summary writ, which takes away the right of trial by jury, which is only to be granted when the right is clear and undisputed, and only when the duty is one specially enjoined by law and arising from an office, trust, or station. Upon this case under our statute the writ of mandamus will not lie. 1 Neb., 127. 7 Neb., 134. 14 Neb., 267. 14 Neb., 509. No statute provides and especially enjoins this duty. Hence the writ must be de-

nied. 20 Kas., 404. 22 Ohio, 475. 17 Ohio St., 103. 8 Kas., 458. 5 Kas., 468. 47 Mich., 426. 17 Minn., 202. 9 Brush, Ky., 544. 16 O. S., 308. 54 Iowa, 438.

REESE, J.

This is an original application for a mandamus to compel the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to the subscribers of the respondent. The respondent has refused to furnish the instruments, and presents several excuses and reasons for its refusal, some of which we will briefly notice.

It appears that during the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish the relator with a directory or list of its subscribers in Lincoln and various other cities and villages within its circuit, and which directory the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish to its subscribers. Finally, the directory was furnished, but upon pay-day the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instruments were removed. Soon afterwards the relator applied to the agent of the respondent and requested to become a subscriber and to have an instrument placed in his place of business, which the respondent refused to do. It is insisted that the conduct of the relator now relieves respondent from any obligation to furnish the telephone even if such obligation would otherwise exist.

We can not see that the relations of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone the law gives it an adequate remedy by an action for the amount due. If the telephone

has become such a public servant as to be subject to the process of the courts in compelling it to discharge public duties, the mere fact of a misunderstanding with those who desire to receive its public benefits, will not alone relieve it from the discharge of those duties. While either, or perhaps both, of the parties may have been in the wrong so far as the past is concerned, we fail to perceive how it can affect the rights of the parties to this action.)

The pleadings and proofs show that the relator is an attorney-at-law in Lincoln, Nebraska. That he is somewhat extensively engaged in the business of his profession, which extends to Lincoln and Omaha, and surrounding cities and county seats, including quite a number of the principal towns in south-eastern Nebraska. That this territory is occupied by respondent exclusively, together with a large portion of south-western Iowa, including in all about fifteen hundred different instruments.

By the testimony of one of the principal witnesses for respondent we learn that the company is incorporated for the purpose of furnishing individual subscribers telephone connection with each other under the patents owned by the American Telephone Company; instruments to be furnished by said company and sublet by the Nebraska Telephone Company to the subscribers to it. This is clearly the purpose of the organization. While it is true, as claimed by respondent, that it has been organized under the general corporation laws of the state, and in some matters has no higher or greater right than an ordinary corporation, yet it is also true that it has assumed to act in a capacity which is to a great extent public, and has, in the large territory covered by it, undertaken to satisfy a public want or necessity. This public demand can only be supplied by complying with the necessity which has sprung into existence by the introduction of the instrument known as the telephone, and which new demand or necessity in commerce the respondent proposes satisfying. It is also

true that the respondent is not possessed of any special privileges under the statutes of the state, and that it is not under quite so heavy obligations, legally, to the public as it would be, had it been favored in that way, but we fail to see just how that fact relieves it. While there is no law giving it a monopoly of the business in the territory covered by its wires, yet it must be apparent to all that the mere fact of this territory being covered by the "plant" of respondent, from the very nature and character of its business gives it a monopoly of the business which it transacts. No two companies will try to cover this same territory. The demands of the commerce of the present day makes the telephone a necessity. All the people upon complying with the reasonable rules and demands of the owners of the commodity—patented as it is—should have the benefits of this new commerce. The wires of respondent pass the office of the relator. Its posts are planted in the street in front of his door. In the very nature of things no other wires or posts will be placed there while those of respondent remain. The relator never can be supplied with this new element of commerce so necessary in the prosecution of all kinds of business, unless supplied by the respondent. He has tendered to it all the money required by it from its other subscribers in Lincoln for putting in an instrument. He has proven, and it is conceded by respondent, that he is able, financially, to meet all the payments which may become due in the future. It is shown that his office can be supplied with less expense and trouble to respondent than many others which are furnished by it. No reason can be assigned why respondent should not furnish the required instruments, except that it does not want to. There could, and doubtless does, exist in many cases sufficient reason for failing to comply with such a demand, but they are not shown to exist in this case. It is shown to be essential to the business interests of relator that his office be furnished with a telephone.

The value of such property is, of course, conceded by respondent, but by its attitude it says it will destroy those interests and give to some one in the same business, who may have been more friendly, this advantage over him.

It is said by respondent that it has public telephone stations in Lincoln, some of which are near relator's office, and that he is entitled to and may use such telephone to its full extent by coming there. That, like the telegraph, it is bound to send the messages of relator, but it can as well do it from these public stations, that it is willing to do so, and that is all that can be required of it. Were it true that respondent had not undertaken to supply a public demand beyond that undertaken by the telegraph, then its obligations would extend no further. But as the telegraph has undertaken to the public to send dispatches from its offices, so the telephone has undertaken with the public to send messages from its instruments, one of which it proposes to supply to each person or interest requiring it, if conditions are reasonably favorable. This is the basis upon which it proposes to operate the demand which it proposes to supply. It has so assumed and undertaken to the public.

That the telephone, by the necessities of commerce and public use, has become a public servant, a factor in the commerce of the nation and of a great portion of the civilized world, cannot be questioned. It is to all intents and purposes a part of the telegraphic system of the country, and in so far as it has been introduced for public use and has been undertaken by the respondent, so far should the respondent be held to the same obligation as the telegraph and other public servants. It has assumed the responsibilities of a common carrier of news. Its wires and poles line our public streets and thoroughfares. It has, and must be held to have taken its place by the side of the telegraph as such common carrier.

The views herein expressed are not new. Similar ques-

tions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertakes to supply a demand which is "affected with a public interest," it must supply all alike who are like situated, and not discriminate in favor of, nor against any. [This reasoning is not met by saying that the rules laid down by the courts as applicable to railroads, express companies, telegraphs, and other older servants of the public, do not apply to telephones, for the reason that they are of recent invention and were not thought of at the time the decisions were made, and hence are not affected by them, and can only be reached by legislation. The principles established and declared by the courts, and which were and are demanded by the highest material interests of the country, are not confined to the instrumentalities of commerce nor to the particular kinds of service known or in use at the time when those principles were enunciated, "but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage coach, from the sailing vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph," and from the telegraph to the telephone; "as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances."] *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S., 9.

In *The State, ex rel., v. The Bell Telephone Company and others*, 36 Ohio State, 296, a writ of mandamus was granted by the supreme court of Ohio to compel the telephone company to place one of its telephone instruments in the place of business of the relator, and to give it equal facilities with other telegraph companies. This decision was

based upon the statute of that state, which provided that telegraph companies should receive dispatches from and for other telegraph company's lines, and from and for individuals, and transmit them with impartiality and good faith, under a penalty of one hundred dollars, and that the provisions of the act should apply also to telephone companies. So far as the obligations of the telegraph companies are defined by the act (except the payment of the penalty) they are simply declarative of the common law. These obligations are imposed by the demands of commerce and trade, and it would be idle to say they existed only by force of the statute, and the same is true of the clause in the act making its provisions applicable to telephones. See authorities cited in the brief of relator in that case. But the court declined to discuss that question, as the question between the parties could be determined by reference to the statute.

In *Allnutt v. Inglis*, 12 East, 527, the court of King's Bench in England, in 1810, held that, "where private property is, by the consent of the owner, invested with a public interest or privilege for the benefit of the public, the owner can no longer deal with it as private property only, but must hold it subject to the rights of the public, in the exercise of that public interest conferred for their benefit."

In *Vincent v. The Chicago & Alton R. R. Co.*, 49 Ill., 33, the supreme court of Illinois held that it was the duty of a railroad company to make a personal delivery of consigned property to the consignee, in cases where such delivery was practicable, and that this duty existed independent of the statute, and it was within the power of the court to enforce the observance of such duty. See also *The People, ex rel., v. The Manhattan Gas Light Co.*, 45 Barb., 361. *Chi. & N. W. R. R. Co. v. The People*, 56 Ill., 365. *Munn v. Illinois*, 94 U. S. Rep., 13.

It is insisted by the respondent that mandamus is not the proper remedy in this case; that if the obligations con-

 Wallingford, Shamp & Co. v. Burr.

tended for by the relator do exist, they are not enforceable by mandamus. To this we cannot agree. To our mind, it is the duty of respondent to furnish the transmitter and telephone to relator as it does to its other subscribers, without discrimination. That this duty arises from the trust or station assumed by respondent, and that relator has no adequate remedy at law. The duty is of the same nature as the duties of common carriers. Respondent is a common carrier of news, the same as a telegraph company. The duty of common carriers is one of law growing out of their office, and not of contract. Redfield on Carriers, 30, § 40. *Western Transportation v. Newhall*, 24 Ills., 466. The remedy by mandamus is the appropriate one. The duty is of a public character, and there is no other adequate mode of relief. *Vincent v. Chi. & Alton R. R. Co.*, *supra*. *State v. Hartford & N. H. R. R. Co.*, 29 Conn., 538. *People v. Albany & Vt. R. R.*, 24 N. Y., 261. 2 Shelf on Railways, 864. Moses on Mandamus, 155, 168, 171, 176. 2 Redfield on Rys., 257, 275, 294. *Chi. & N. W. Ry. Co. v. The People*, 56 Ills., 365. *The State, ex rel., v. The Bell Telephone Co.*, *supra*.

A peremptory writ of mandamus must be awarded.

WRIT ALLOWED.

17	137
38	487

WALLINGFORD, SHAMP & Co., PLAINTIFFS IN ERROR, v.
L. C. BURR, DEFENDANT IN ERROR.

1. **Sale: GOOD-WILL.** The good-will of a mercantile or other business is property for which, in a proper case, the purchaser is liable.
2. **Assignment** set forth in opinion, *Held*, To be absolute and without limitation.
3. **New Trial: costs.** Where upon a new trial being granted

the plaintiff was permitted to amend his petition by stating more fully a cause of action arising on his contract—not a new cause of action, *Held*, That an order requiring him to pay only a part of the costs then accrued would not be set aside.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Brown & Ryan Brothers, for plaintiffs in error.

L. C. Burr, for defendant in error.

MAXWELL, J.

This case was before this court in 1883, and is reported in 15 Neb., 204, the judgment of the court below being reversed. The action was brought to recover for an alleged sale and delivery of goods, wares, and merchandise, etc. A copy of the contract is set out in the former opinion. This court held that the sale of the goods was not complete before they were seized upon execution against Keefer, and hence for the goods thus seized and sold on the execution no recovery could be had. It was evident, however, that the plaintiffs had obtained the lease of the store, the good-will of the business, a considerable quantity of goods on commission, upon which the freight had been paid, and other property. Hence, in the former opinion, it is said (pages 208-9), "for the goods obtained by them which were held on commission, for the store and good-will, and any other property they may have received, they are liable." The court permitted the plaintiff below (defendant in error) to amend his petition, and on the trial he recovered the sum of \$782.19.

The principal grounds of objection to the judgment are: *First*. That no claim for the good-will was made in the first petition; and *Second*. That the assignment does not transfer the same to the defendant in error.

That the good-will of a mercantile or other business is

Wallingford, Shamp & Co. v. Burr.

a part of its assets was held by this court in *Sheppard v. Boggs*, 9 Neb., 258. See also *Willett v. Blanford*, 1 Hare, 253. *Bradbury v. Dickens*, 27 Beav., 53. *Williams v. Wilson*, 4 Sand. Ch., 380. *Wedderburn v. Wedderburn*, 22 Beav., 84. *Dayton v. Wilkes*, 17 How. Pr., 510. *Hathaway v. Bennett*, 10 N. Y., 108. *Fenn v. Bolles*, 7 Abb. Pr., 202. *Kellogg v. Totten*, 16 Id., 35. Being property it was subject to sale, and was expressly included in the contract. The plaintiffs have received the benefit of it, and justice requires that they should pay for the same.

Second. The assignment from Keefer to Burr is as follows:

“LINCOLN, NEBRASKA, January 17th, 1882.

“For value received, I hereby sell, assign, transfer, and set over unto L. C. Burr all my right, title, and interest in and to the balance due me on sale of goods, etc., to Wallingford, Shamp & Co., in the sum of \$2,558.80, less a payment of \$144.98, leaving due from Wallingford, Shamp & Co. to me the full sum of twenty-four hundred thirteen and eighty-four-hundredth dollars.

“HENRY KEEFER.”

It is evident that Keefer intended to assign all his interest in the proceeds of the property to Burr, and that the statement of the amount due from the plaintiffs is in the nature of an assertion that the claim amounted to the sum named. But there are no words of limitation or restriction. The assignment therefore includes the entire amount due from the plaintiffs for all the property purchased by them from Keefer, designated in the written contract. The objection, therefore, is untenable.

The jury would have been justified in returning a verdict for a much larger amount, but as the defendant in error does not complain it will not be set aside.

As a condition of amending his petition, the plaintiff below was required to pay \$50 of the costs then accrued. The plaintiffs in error claim that he should have been re-

quired to pay all costs to that date. It is evident, however, that he merely stated more fully his cause of action based upon the written contract for the good-will, and did not state a new cause of action. The court did not err, therefore, in not requiring the payment of all the costs. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE OTHER JUDGES CONCUR.

17 140
17 393
20 377
23 133
17 140
49 334
52 247

OTTO H. DOGGE, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Medicine: QUALIFICATIONS OF PHYSICIAN.** A person practicing medicine or surgery in this state must possess the qualifications designated in at least one of the four classes prescribed by section four of the act to regulate the practice of medicine in this state, approved March 3d, 1881, as amended in 1883; and must file the sworn statement required by section two of the act of 1881 with the county clerk.
2. **Amending Statutes.** In amending an act it may be designated by its title or chapter in the Compiled Statutes.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

J. C. Johnston and Lamb, Ricketts & Wilson, for plaintiff in error.

William Leese, Attorney General, for the State.

MAXWELL, J.

The plaintiff in error was convicted of practicing medicine in Lancaster county without first having complied

with the act "to regulate the practice of medicine in the state of Nebraska," approved March 3d, 1881 (Laws of 1881, pages 282-286). The testimony shows that he is a graduate of one or more medical colleges, and that he has practiced medicine for about eighteen years before removing to this state. He therefore claims that the provisions of the act do not apply to him.

Sec. 1 of the act above referred to declares that "it shall be unlawful for any person to practice medicine, surgery, or obstetrics, or any of the branches thereof, in the state, without first having complied with the provisions of this act relating to registration; and no person practicing medicine, surgery, or obstetrics, or any of the branches thereof, shall be entitled to registration unless possessed of the qualifications required by section four of this act."

Sec. 4, as amended in 1883, is as follows: "No person shall be entitled to registration as a physician or surgeon under the provisions of this act, or to practice medicine, surgery, or obstetrics, or any branch thereof, in this state, unless he or she shall be possessed of one of the qualifications named in this section, as follows: *First.* A graduate of a legally chartered medical college or institution having authority to grant the degree of "Doctor of Medicine;" or *Second.* Persons who can show documentary evidence that they have passed a satisfactory examination before medical boards of other states created for the purpose of such examination, and all surgeons and assistant surgeons who were commissioned and served as such in the late war of the rebellion; or *Third,* A person who shall have, at the time this act takes effect, attended one course of lectures in a legally chartered medical college or institution having authority to confer the degree of "Doctor of Medicine," and practiced medicine continually for three years, the last one year of which practice shall have been in this state; or *Fourth,* A person who shall have been, at the time of the taking effect of this act, engaged in the practice of medi-

cine, surgery, or obstetrics for a livelihood for a period of ten years, the last two years of which practice has been in this state. *Provided*, That no person not a resident of this state at the time this act takes effect who has not received the degree of doctor of medicine from a legally chartered medical college or institution having authority to grant the same, shall be admitted to registration under this act, or authorized to practice medicine, surgery, or obstetrics in this state." Laws of 1883, page 246.

Sec. 2 of the act of 1881 requires the person registering as a physician or surgeon to file with the county clerk of the county in which he or she resides a statement under oath "giving his or her full name, age, place of birth, place of residence, place of business, and the time he or she has practiced medicine; and when and where he or she has so practiced, and the time of such practice in each place; and if he or she is or has been a member of any medical society or societies, the name and location of such society or societies; and if he or she is a graduate of any medical college or university, the date of his or her graduation, and the full and true name and location of such college, institution, or university," etc. Secs. 3 and 9 provide penalties. The statute authorizes any person designated in the first, second, third, or fourth class to register, and thereupon practice medicine or surgery for a livelihood. The act applies to all alike, to the most skillful physician and the mere tyro—each must register and bring himself within one of the classes named. The evident purpose of the act is to restrict the practice of medicine or surgery to those persons whose education and training may reasonably be supposed to have qualified them for the business. The fact that a person is a graduate of a medical college and has received the degree of "Doctor of Medicine," will not authorize him to practice medicine in the state unless he register as required by the second section of the act. He must not only possess the qualifications designated in at

least one of the classes named, but must allege the same in his written statement filed with the county clerk, and unless he do so he is liable to the penalties prescribed in the act.

Objection is made to the title of the act of 1883, which is as follows: "An act to amend section 4 of chapter 55 of the Compiled Statutes of Nebraska." Chapter 55 of the Compiled Statutes of 1881 is the act to regulate the practice of medicine in the state of Nebraska, approved March 3, 1881, and while the subject matter was arranged and the chapters numbered by the compiler and not by the legislature, yet it is sufficiently definite to show what was intended. All that the law requires is that the amendatory statute shall be definite and certain as to the statute amended. This may be accomplished as well by designating the chapter in the Compiled Statutes as by referring to the act by its title. The legislature alone decides upon the title of an act or amendment thereto, and the act will not be declared unconstitutional unless it is clearly so. The title to the amendatory act in this case is sufficient, and the act is valid. On the argument of the cause some objection was made to the title of the act as not broad enough to include the penalty, but as no objection of this kind is made in the plaintiff's brief it is presumed to be waived. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN O. SAVAGE, PLAINTIFF IN ERROR, v. O. H.
PELTON, DEFENDANT IN ERROR.

Practice in Supreme Court. When no question of law is presented in a petition in error, nor raised by the record, and there is sufficient evidence to sustain the verdict, the judgment of the trial court will be upheld.

ERROR to the district court for Gage county. Tried below before BROADY, J.

A. Hardy, for plaintiff in error.

R. S. Bibb, for defendant in error.

COBB, CH. J.

This action was originally brought before a justice of the peace. The plaintiff in error here was also plaintiff before the justice. The plaintiff's cause of action consisted of a bill of particulars for goods, wares, and merchandise sold and delivered, interest on the same after six months, and certain items of work and labor, amounting in all to the sum of \$95.52, for which plaintiff demanded judgment. The defendant denied the several items of the plaintiff's account, and presented a counter-claim, consisting of an account for goods, wares, and merchandise sold and delivered by him to the plaintiff, and work and labor by him performed for the plaintiff and at his request, and claimed a balance due him of two hundred dollars.

There was a trial and judgment by the justice, and the cause taken to the district court on appeal, where, on substantially the same pleadings there was a trial to a jury, a verdict and judgment for the defendant. And the cause is brought to this court on error. The sole error assigned is, that the verdict is not sustained by the evidence.

Ex parte Eads.

The evidence consisted of the testimony of the plaintiff in his own behalf, that of the defendant in his own, and that of one witness called by the plaintiff, whose testimony was confined to certain admissions alleged to have been made by the defendant, and which admissions were applicable to but one item of plaintiff's bill of particulars.

Upon an examination of the evidence it is quite apparent that had the jury believed all of the testimony of the defendant, and disbelieved all that of the plaintiff, they would have found a much larger verdict than they did. On the other hand, had they believed all of the plaintiff's testimony, and disbelieved that of the defendant, the finding would have been for the plaintiff. To say the least of it, there was evidence on both sides. The whole controversy was based upon questions of fact, and was fairly submitted to jury. Therefore, upon no principle recognized by courts of error can the verdict of the jury be disturbed.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	145
21	557

EX PARTE A. F. EADS.

Complaint before Magistrate. A complaint in a criminal prosecution must be sufficiently specific to negative the innocence of the party sought to be charged with an offense. And when the statute makes it a crime to injure growing trees, "the property of another," it is necessary that the ownership of the injured property be alleged, giving the name of the true owner.

ORIGINAL application for habeas corpus.

Hazlett & Bates, for the application.

William Leese, Attorney General, *contra*.

BY THE COURT.

This is an original application to this court for a writ of *habeas corpus*. The application alleges that A. F. Eads is unlawfully deprived of his liberty by the sheriff of Gage county upon a mittimus issued by a justice of the peace of said county, and that said Eads is not charged with the commission of any offense. Copies of the complaint and mittimus are attached to the application. The complaint and mittimus allege that the said Eads, on the twenty-fourth day of August, 1884, in the county of Gage and state of Nebraska, "did unlawfully, feloniously, willfully, maliciously, and without lawful authority, enter upon the farm of Mathias Joseph and cut down and destroy fruit and shade trees to the amount of \$44. Said trees were grown on the farm of said Joseph, in Gage county, Neb."

Section 88 of the criminal code, under which the applicant is prosecuted, is as follows: "If any person or persons shall willfully and maliciously, and without lawful authority, box, bore, bark, girdle, saw, cut down, injure, or destroy, to the amount in value of thirty-five dollars or upwards, any fruit, ornamental, shade, or other tree or trees, standing or growing in any orchard, nursery, or grove the property of another, every such person or persons shall be imprisoned in the penitentiary and kept at hard labor not more than ten years, nor less than one year, and shall moreover be liable to the party injured in double the amount of damages by him sustained."

It is not alleged in the complaint or mittimus that the trees alleged to have been injured were the property of any other person than the party charged with their destruction. The principal element of the crime, as defined by the statute, is, that the trees alleged to have been injured must have been "the property of another." If it was not, no crime has been committed. In a complaint or indictment the innocence of the party sought to be charged must at least be negatived. It was not done in this case.

Other objections are urged to the allegations—or rather the want of allegations—in the complaint and mittimus, but they need not be further noticed. It is clear that no offense is charged. The person for whom the application is made must be discharged.

JUDGMENT ACCORDINGLY.

**ENOCH BRADSHAW, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.**

1. **Bill of Exceptions: AFFIDAVITS.** Affidavits filed as evidence in the district court must be certified to the supreme court by a proper bill of exceptions, and be thus made a part of the record, or they cannot be considered.
2. **JUROR: CONVICTIONS ON SUBJECT OF CAPITAL PUNISHMENT.** If a juror, on his *voir dire* examination in a case depending upon circumstantial evidence, answer that his convictions are such as would preclude him from returning a verdict of guilty where the punishment would be death, it is good ground of challenge for cause on the part of the state. *St. Louis v. State*, 8 Neb., 405.
3. **Assistant to District Attorney.** The district attorney, in a criminal trial, may have the assistance of counsel employed on private account. *Polin v. State*, 14 Neb., 540.
4. **Attorney: ARGUMENT: REVIEWING CONDUCT ON ERROR.** Where it is alleged that an attorney, in the argument of a cause on trial to a jury, made misstatements of the evidence and went outside of the record in his statements of the facts proved on the trial, the attention of the court should be called to the language and conduct of the attorney by the proper objection, and a ruling had thereon by the court. If the objection is overruled and an exception taken the question may be reviewed in the supreme court upon the language, objection, ruling, and exception being made a part of the record by the proper bill of exceptions, but not otherwise.
5. **Instructions.** Instructions to a jury must be applicable to the

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testimony introduced upon the trial. It is not error to refuse to instruct upon a point of law which does not arise in the case, and which would have no reference to any of the evidence.

6. ———: It is not error on the part of the court to refuse to give an instruction when the same has, in substance, been already given.
7. **Criminal Law: EVIDENCE: REASONABLE DOUBT.** In cases of circumstantial evidence it is necessary that all the necessary facts and circumstances essential to the conclusion be proved beyond a reasonable doubt, but it is not necessary that each link in the evidence "relied upon" should be proven beyond a reasonable doubt. Such facts if not proven should be discarded by the jury.
8. ———: ———: The evidence in the case examined and found sufficient to sustain the verdict of the jury.

ERROR to the district court for Gage county. Tried below before DAVIDSON, J.

L. W. Colby (Hazlett & Bates with him), for plaintiff in error.

William Leese, Attorney General, for the State.

REESE, J.

The plaintiff in error was indicted by the grand jury of Gage county for the murder of Henry C. Voorhees. Upon trial he was found guilty of murder in the second degree, and was sentenced to the penitentiary for life. He alleges error, and seeks to reverse the judgment of the district court. The questions presented by his brief and the record will be noticed in the order in which they are presented.

Complaint is made of the decision of the district court in overruling a motion made by plaintiff in error for a change of the place of trial. The motion is based upon the alleged bias and prejudice of the citizens of the county in which the cause was pending, to such an extent that a

fair and impartial trial could not be had in that county. We find quite a number of affidavits attached to the record which seem to have been taken upon the issue presented by this motion, and if they were all presented to the trial court there is no error in its ruling, for we think there was sufficient to warrant it in finding that such bias and prejudice did not exist. But these affidavits are in no way certified to by the court, are not embodied in any bill of exceptions, and, as has been repeatedly held by this court, cannot be here considered. If it is desired to review the decision of a district court upon any question of fact, the proof submitted to that court must be preserved by a proper bill of exceptions. Affidavits come directly within this rule, and must be preserved by bill of exceptions and made a part of the record in order to be considered. *Tessier v. Crowley*, 16 Neb., 369, and cases there cited.

The foregoing observations will also apply to the second point of error assigned, which is, that the district court erred in overruling the motion of plaintiff in error for a continuance. We observe an "explanation" following the motion, and which was doubtless intended for the clerk to sign, to the effect that the affidavits referred to by the motion "are copied and appear next before said motion;" but the clerk's signature does not appear. It is not signed. But this would not have been sufficient. All such affidavits must be incorporated into the record by a bill of exceptions. The mere certificate of the clerk is not enough.

Complaint is made of the rulings of the district court in sustaining and overruling challenges made to jurors while impaneling the trial jury. We have read that part of the record, and find that four challenges to jurors, for cause, made by the state were sustained, and to which plaintiff in error excepted. Mr. Deny was called as a juror. In answer to questions propounded by the district attorney, he stated that he had conscientious scruples against the death penalty in case of murder, and that he did not believe in

inflicting such penalty. The court then asked him if his opinions were such as would preclude his bringing in a verdict of guilty where the prisoner was charged with an offense the penalty of which was death. His answer was, "Well, I should be opposed to bringing in a verdict of that kind because I am opposed to the death penalty."

Mr. Mundel was called as a juror, and in answer to the question of the district attorney stated that he had conscientious convictions upon the subject of the infliction of the death penalty; that he did not believe in it in any case. The court then asked him the following question: "Are your opinions such as to preclude you from bringing in a verdict of guilty where the defendant was charged with an offense the penalty of which was death?" The juror answered frankly, "Yes, sir."

J. E. Bryant was called and interrogated by the district attorney. He stated unequivocally that he was not in favor of inflicting the death penalty. The court then propounded to him this question: "Are your opinions such as preclude your bringing in a verdict of guilty in a case where the defendant is charged with an offense the penalty of which is death?" Answer, "They are."

Mr. Bartley, on being examined as to his qualifications, stated that if the evidence was positive and direct he would have no such opinions as would prevent him from returning a verdict of guilty, but that in a case of circumstantial evidence he would not do it. At the close of his examination, when asked by the court whether he could or could not, he answered as follows: "That I could not in circumstantial evidence convict a man of murder in the first degree."

These jurors were challenged for cause by the district attorney, and the challenge being sustained by the court they were excused. In this there was no error. The law prescribes but one punishment for murder in the first degree, and that is death. If a person is called to act as a

juror, who states in the outset that he so thoroughly abhors that mode of punishment that he would not in any case assent to its administration, it would be a mockery to retain him on the jury. If he believes it to be essentially wrong to inflict the penalty, he of course could not assent to it. The same may be said as to the juror who would not convict upon circumstantial evidence. The questions here presented have already been passed upon by this court in *St. Louis v. The State*, 8 Neb., 405.

It is next urged that the court erred in permitting W. H. Ashby, an attorney of the Gage county bar, to assist the district attorney in the prosecution of plaintiff in error. The record shows that before any evidence was introduced the district attorney stated to the court that he desired the assistance of Mr. Ashby in the trial of the cause on account of the magnitude of the case, that he had before that time requested his aid, etc. Plaintiff in error objected by his counsel, and stated that the attorney was not a disinterested attorney, and was employed by the friends of the deceased. The court overruled the objection, and allowed Mr. Ashby to assist in the prosecution. In this there was no error. *Polin v. The State*, 14 Neb., 540.

The fifth and sixth assignments of error are to the effect that the trial court erred in its rulings upon the admissibility of testimony offered by the state and by plaintiff in error during the trial. These assignments are too general. If it is desired to have the rulings of the lower court reviewed by this court such rulings as are thought to be objectionable should be designated or pointed out. We have examined the evidence throughout, and are unable to find such prejudicial error as would call for a reversal of the case.

The next question presented is, that "the district court erred in permitting the district attorney to make misstatements of the evidence, and statements not warranted by the evidence, prejudicial to the accused in the argument of

the case to the jury." By an examination of the bill of exceptions we find the facts stated or recited therein that, in the argument of the case to the jury, the district attorney made use of certain language there quoted, which it is said was objected to and the language "taken down at the request of counsel for defendant." But nowhere is it shown that the ruling of the court upon the objection was adverse to plaintiff in error, or that any ruling thereon was requested. The supreme court, in the exercise of its appellate jurisdiction in cases of this kind, is limited to the correction of the errors of the district court. Before a case can be reversed and a new trial ordered it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language and a ruling had upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted. By a bill of exceptions showing the language used, the objection, ruling of the court, and exception, the question can be presented to this court for decision. If the trial court sustains the objection, and thus condemns the language and requires the attorney to desist and confine himself to the evidence in the case, no injury is suffered by the accused. *Cropsey v. Averill*, 8 Neb., 160. A large number of authorities are cited by plaintiff in error for the purpose of showing that a new trial will be granted where it appears that the attorney for the prevailing party has abused the privileges of counsel in an argument to a jury. It is quite probable that where such abuse is apparent and to the prejudice of the unsuccessful party, it should be done. But it must be upon a proper record showing a refusal of the district court to correct the wrong if any be done.

In *Cleveland Paper Co. v. Banks*, 15 Neb., 20, a new trial was granted for what doubtless seemed to the court to be a flagrant abuse of the privileges of the attorney for the prevailing party. But it is noticeable that the question of practice was not involved and was not decided in that case except in so far as it affected the conduct of the successful party in the district court.

The eighth point presented by the brief of plaintiff in error is, that "the court erred in refusing to give the seventh paragraph of instructions asked by defendant." The instruction referred to is as follows: "The jury are instructed that the law makes the defendant in this case a competent witness, and that the jury have no right to disregard his testimony on the ground alone that he is the defendant and stands charged with the commission of a crime. The law presumes the defendant to be innocent until he is proven guilty, and the law allows him to testify in his own behalf, and the jury should fairly and impartially consider his testimony, together with all the other evidence in the case; and if from all the evidence the jury have any reasonable doubt as to whether the defendant committed the crime in manner and form as charged in the indictment, you should give the defendant the benefit of the doubt and acquit him."

Viewing this instruction as an abstract statement of the law of the land as applicable to a proper case, we might not differ with the counsel for plaintiff in error. But we are left wholly in the dark as to its applicability to the case at bar. We have carefully read all the testimony introduced upon the trial, and have again carefully gone through the record, which is quite voluminous, and we are unable to find any word of testimony given by the accused in his own behalf. There is no record of his having been sworn as a witness. The instruction did not apply to the case and was rightfully refused. Instructions must be based upon the evidence. *Meredith v. Kennard*, 1 Neb.,

319. *Neihardt v. Kulmer*, 12 Neb., 38. *City of Crete v. Childs*, 11 Neb., 257. *Williams v. State*, 6 Neb., 334.

The trial court refused to give the fifteenth instruction asked by plaintiff in error. This instruction was a literal copy of section 27, page 165 of the Compiled Statutes of this state, defining the boundaries of Gage county, following with the charge that unless it was proven by the evidence that the offense charged in the indictment was committed within the boundaries of said county it was the duty of the jury to acquit. This instruction had already been substantially given to the jury in the twelfth instruction given upon the motion of plaintiff in error, a part of which was as follows: "It is necessary for the state, in order to secure a conviction in this case, to prove beyond a reasonable doubt that the crime was committed in Gage county, Nebraska." This was sufficient upon that point. If an instruction has already been substantially given one similar to it may be refused. *Olive v. State*, 11 Neb., 30. *Binfield v. State*, 15 Neb., 489. *Kerkow v. Bauer*, Id., 167.

The next assignment of error contained in the brief of plaintiff in error is, that "the court erred in giving the tenth, twelfth, thirteenth, fifteenth, and seventeenth paragraphs of instructions given by the court on its own motion." No suggestion is made as to how or in what particular the court erred in giving these instructions, and nothing further concerning them is contained in the brief. As the next assignment of error includes in the same general way all the other instructions (except the first) given to the jury, otherwise than at the request of plaintiff in error, we will dispose of all, except the eighth, by saying we have examined them and see no good ground for criticism.

The eighth instruction, being specially pointed out as objectionable, will be noticed with more particularity. It is as follows: "The court further instructs the jury that

the rule requiring the jury to be satisfied of defendant's guilt beyond a reasonable doubt, in order to warrant a conviction, does not require that the jury should be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish defendant's guilt; it is sufficient if, taking the testimony altogether, the jury are satisfied beyond a reasonable doubt that the state has proven each material fact charged, and that the defendant is guilty."

It is insisted that as this case depended upon circumstantial evidence this instruction must have had great weight with the jury, and might have misled them to the prejudice of plaintiff in error if it was considered by them at all in their deliberations. As was intimated in *Marion v. The State*, 16 Neb., 349, decided by this court during the last term, this instruction standing alone might mislead a jury. In such a case, it seems to us, it should be looked upon with disfavor. Unexplained by other instructions it might be misunderstood. As we understand the rule in cases of circumstantial evidence it is necessary, in cases of this kind, for the state to prove beyond a reasonable doubt every circumstance which is *essential* to the conclusion. Starkie on Evidence, 855. Burrill on Circumstantial Evidence, 136.

An alleged circumstance may, in the language of the instruction, be "relied upon" in the chain of circumstances by which the guilt of an accused is sought to be established or the conclusion reached, and yet not be essential to that conclusion. A circumstance may be "relied upon" by the prosecution as tending to prove facts from which the inference of guilt is to be drawn, and yet it may not, in the language of Starkie, be one of the "circumstances from which the conclusion is drawn." The ultimate conclusion of guilt is drawn from certain essential facts, from the existence of which the mind is logically and irresistibly forced to infer the main fact to be proved. If one of these essential facts

is wanting, the mind fails to reach the conclusion. To illustrate, we will suppose a dead body is found upon the public highway. Upon inspection it is apparent that death has been recent and from external violence. A person is subsequently charged with the commission of a murder in killing the deceased. The evidence is circumstantial. Among the circumstances proven is, that at about the time of or soon after the death of deceased a person was seen some distance from the body going hastily in a direction opposite to that of the body. From the distance at which he was observed he is said by the witnesses who saw him to be of the same general description of the accused, and that they believe it to have been him. This fact is relied upon by the prosecution as one "link in the chain of circumstances" "to establish the defendant's guilt," and it is so urged upon the attention of the jury as proof that it was the accused who was thus seen by the witnesses. But the jury, satisfied beyond a reasonable doubt of the guilt of the accused, from a convincing array of *other* circumstances, wholly disbelieve that the person seen by the witnesses was the accused, and are satisfied that it was another individual. It would not necessarily follow that they should for that reason acquit.

A man is accused of the murder of his wife by the administration of a deadly poison. All the circumstances of the case point with almost absolute certainty to his guilt. The jury are satisfied of it beyond a reasonable doubt. He is proven to be devoid of affection for her, has been seen to cruelly maltreat her. His conduct toward another woman establishes the fact that she has supplanted his wife in his affections. The poison has been found within the body of deceased in a sufficient quantity to produce death. He is shown to have recently purchased the same kind of poison for the alleged purpose of destroying a family dog which has been permanently injured but which he wishes to kill without pain. It is shown he had no dog, and none

had been injured. He has but recently caused the life of his wife to be heavily insured. He has been heard to make threats and insinuations which, in the light of subsequent events, show that he intended and confidently expected her death at an early day. A witness is called for the prosecution, who testifies that at a particular time he saw the accused in the company of the other woman under circumstances of very questionable propriety, and which, if believed, would establish illicit intercourse between them. This last fact is "relied upon" as a "link in the chain of circumstances" to establish the fact of his guilt of the crime charged. The jury are fully satisfied of his guilt, but from the conduct or demeanor of the witness, or from some other cause, do not believe the story of the illicit intercourse. Must they therefore find the accused not guilty? Clearly not. That circumstance, although "relied upon," should be disregarded.

By an examination of the other instructions given to the jury it is very apparent that the language used in this eighth instruction was used in the sense above indicated, and could not, in connection with the others, mislead the jury. "The true meaning and effect of instructions are not to be determined by the selection of detached parts thereof, but by considering all that is said upon each particular subject or branch of the case." *St. Louis v. The State*, 8 Neb., 405. The instructions given to the jury were full and elaborate. The law of circumstantial evidence was fully explained, and the jury were thoroughly informed that all the inculpatory facts necessary to establish the guilt of plaintiff in error should be fully proved; and that they must be such facts and circumstances as were absolutely incompatible with the innocence of plaintiff in error and incapable of explanation upon any reasonable hypothesis other than that of his guilt. In *The State v. Hayden*, 45 Iowa, 11, the trial court was requested to charge the jury as follows: "As the evidence in the case

is wholly circumstantial, you must be satisfied beyond a reasonable doubt of each necessary link in the chain of circumstances to establish the defendant's guilt." This instruction was refused, and the following was given by the court: "The defendant is presumed to be innocent of the crime charged until proved guilty beyond a reasonable doubt; and as the evidence in this case is circumstantial, it is your duty to give all the circumstances a careful and conscientious consideration, and if upon such consideration the minds of the jury are not firmly and abidingly satisfied of the defendant's guilt, if the conscientious judgment of the jurors wavers and oscillates, then the doubt of the defendant's guilt is reasonable, and you should acquit." The court, by Rothrock, J., say: "The instruction asked by defendant was properly refused, and that given by the court is correct. It is not a reasonable doubt of any one proposition of fact in the case which entitles to an acquittal. It is a reasonable doubt of guilt arising upon the consideration of all the evidence in the case."

In *Sumner v. The State*, 5 Blackf., 579, the following instruction was asked by the defendant, who was on trial for the murder of his wife: "Every circumstance material to this case must also be proved beyond a rational doubt, or it is the duty of the jury to discard such circumstance in making up their verdict." This instruction was refused, and the refusal held to be error. Blockford, J., in writing the opinion of the court, says: "We think that if the jury, in making up their minds from circumstantial evidence, have a rational doubt as to the existence of any of the material circumstances attempted to be proved, that circumstance ought not to have any influence with them in forming their opinion respecting the guilt or innocence of the defendant; or, in the language of the instruction asked, the jury ought in such case 'to discard such circumstance in making up their verdict.'" Applying this rule to the case at bar it was not only correct for the court to instruct the

jury that it was not necessary that each link relied on should be proved beyond a reasonable doubt, but it would have been competent to instruct them that if any of the circumstances "relied upon" were not proven they might discard them entirely and consider the case without reference to them.

The next and last proposition contained in the brief of plaintiff in error is, that "the evidence was not sufficient to sustain the verdict of the jury." It is impracticable in this opinion to discuss the evidence at any great length. The trial was a long one, the record is voluminous. The circumstances pointing toward plaintiff in error are numerous, and are such as to convince the mind of his guilt. The evidence shows that the deceased was a young unmarried man living with his father in Schuyler county, Missouri. That plaintiff in error lived a short distance away, and was above middle age, his hair and beard being quite gray. Deceased was the owner of a span of mules, wagon, and harness, and about one hundred dollars in money, besides some personal property in the way of farming implements. By reason of certain representations plaintiff in error induced young Voorhees to accompany him, with the property, to Nebraska, leaving home on the twenty-eighth of November, 1878. These representations consisted in a flattering description of the beauties of Nebraska, with the further suggestion that plaintiff in error was the owner of a farm in this state on which a crop of corn was standing, which would furnish plenty of feed for the team of deceased, and which would be at his service. They did not leave the home of deceased together, but agreed to meet at a point a short distance on the way. Plaintiff in error was a larger man than deceased. Deceased took with him a quantity of under-clothing and other articles of property, which were placed in an ordinary boot box and put into the wagon. Among the articles taken by deceased was an "S" wrench, for use

about the wagon, which was given him by his father, who, before putting it in the wagon, made upon it three private marks with a hand-saw file. Soon after this time deceased was seen in Beatrice in company with another person, who is not fully identified as the plaintiff in error, but whose peculiar motions and the manner in which he wore his hat were described as similar to the accused. Plaintiff in error soon afterward, about Christmas, 1878, returned to Missouri alone. In a conversation with one of the witnesses with whom he had not been previously acquainted, he stated that he had been to Nebraska and Kansas. He did not go home, but went to work about thirty miles from there at a saw-mill, hauling railroad ties with a team and wagon which he had, but which were not the team and wagon formerly owned by Voorhees. He secured a boarding place for himself and team, but declined sleeping in a bed, preferring to sleep on the floor near the fire with no bedding but his blankets and without removing his clothing. He appeared to be watchful, wakeful, uneasy, and suspicious. During the night he often went out, waking the family, and when spoken to about his conduct he gave as a reason that he had recently traded a span of mules for the team he then had and that one of his horses was inclined to be fractious and he was uneasy about them. He had a boot box in which his clothing, etc., were kept. Part of his under-clothing was noticed by the woman who did his washing to be much smaller than his other garments of the same kind, and at each time they were washed had to be mended, having the appearance of being "burst." He disposed of some property in the neighborhood, amongst which was the identical "S" wrench furnished young Voorhees by his father. This wrench was produced in court and fully identified by the father. The man with whom he boarded was in the habit of arising at four o'clock in the morning. It being in the winter it was not yet light. He testifies that plaintiff in error was always up before him and gene-

rally at the barn. That when the witness went to the barn plaintiff in error would always hail him and ask who was there. It was the custom of the person hiring the men to haul ties to pay them at the end of the month, but plaintiff in error insisted upon collecting his wages at the close of each day. He remained there from about Christmas until in March, 1879, following. During this time he went away twice to see his family, who lived near the former home of Voorhees, and about thirty miles distant, making the trip in the night. When asked by those who knew of his having left Missouri with young Voorhees as to what had become of Voorhees, his statements were very contradictory. To some he said deceased had left him at a camping place in the night, without taking his clothing and without any intimation that he was going, and he had never heard from him since. And when asked what he had done with the team and wagon belonging to deceased, he replied that he had traded it off, as Henry Voorhees' father would have taken them away from him. To others he said deceased had sold his team in Kansas and had gone to Texas to herd and drive cattle on the plains; that he had hired to some cattle men for that purpose. He stated to some that he did not like "Old Man Voorhees," and had long desired to get even with him, and that he had now succeeded. That he had enticed his boy Henry away from him, and he would never hear of him again. In the evening of the last day he worked hauling ties he was informed that a man had been inquiring for him in the vicinity, when he immediately hitched up his team and left without waiting to eat supper, and was seen there no more. He appeared in the neighborhood where the father of Voorhees resided, near his own home, and enquired of a neighbor as to what people thought had become of deceased, and upon being informed that it was believed he had murdered him, he requested that nothing be said about his presence until nine o'clock next day, by which time he

could make his escape into Iowa. In this conversation he stated he had left deceased on the Missouri river, where he was teaming, and that he was then corresponding with him, looked in his pocket-book as if hunting for the letters, and then said he had left them at his boarding place. This was the last seen of him by any of the witnesses until his capture in Council Bluffs and incarceration in jail at Beatrice. After his arrest and confinement he sought to render his identity uncertain by coloring his hair and having his beard cut off, and afterwards, when visited in the jail by those with whom he was well acquainted, he denied his identity.

The identity of the dead body found in Gage county in the early spring of 1879 as the body of Henry Voorhees is beyond any question. A "tattoo" mark, "H. C. V." upon his arm, as well as a correct photographic likeness of the dead body, which was identified by his father and others, place the question of identity beyond any question. It is also shown that he came to his death by external violence, and, by wagon tracks in the prairie grass, it is shown that the body was placed where it was found by some one seeking to conceal it.

The evidence, only a part of which is here reviewed, is sufficient to sustain the verdict. From a full examination of the case, such as its great importance requires, we are satisfied that justice so long delayed has been done, and that there is no such error in the record as to require a reversal of the judgment. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

Dobbins v. Oberman.

THOMAS DOBBINS, APPELLANT, V. FRANK H. OBERMAN
ET AL., APPELLEES.

1. **Negotiable Instruments.** A note in the following form:
"October 4, 1882. On March 1, 1883, for value received, I promise to pay Anna M. Wilson or order four hundred dollars, with interest from this date. This note shall become due immediately upon Anna M. Wilson delivering possession to me of the north-west quarter of section 12, town 6, range 6 E., in Gage county, Nebraska." Signed. *Held*, To be negotiable.
2. ———: **BONA FIDE PURCHASER.** A holder of negotiable paper who takes it before maturity for a valuable consideration, in the usual course of trade, without knowledge of facts which impeach its validity between antecedent parties, holds it by a good title. *Johnson v. Way*, 27 O. S., 374.
3. ———: ———: **EVIDENCE.** To defeat a recovery thereon it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. *Id.*
4. ———: ———: ———. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part. *Id.*
5. ———: ———: ———. Circumstances tending to show bad faith or fraud in taking such paper are admissible in evidence, and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defenses existing between antecedent parties. *Id.*

APPEAL from Gage county district court. Heard below before BROADY, J., on report taken by S. J. Tuttle, referee.

Lamb, Ricketts & Wilson and *Novia Z. Snell*, for appellant.

James E. Philpott, for appellees.

COBB, CH. J.

This action was brought in the court below by Thomas Dobbins, plaintiff, against Frank H. Oberman and wife

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defendants, for the purpose of foreclosing a mortgage on real estate. Hoagland Brothers and The Chicago Lumber Company were also made defendants, as the holders of liens on the said real estate. The defendant, Frank H. Oberman, purchased the tract of land in question from one Anna M. Wilson, receiving from her and W. F. Wilson, her husband, a warranty deed therefor, and paying her part cash and giving her the note and mortgage involved in this suit for four hundred dollars, the balance of such purchase price. This transaction took place on the fourth day of October, 1882. The following is a copy of the note:

"LINCOLN, NEBRASKA, October 4, 1882.

"On March 1, 1883, for value received, I promise to pay to Anna M. Wilson, or order, four hundred dollars with seven per cent interest from this date. This note shall become due immediately upon Anna M. Wilson delivering possession to me of the north-west quarter of section 12, town 6, range 6 E., in Gage county, Nebraska.

"F. H. OBERMAN.

This note was, on the ninth day of October, 1882, as appears by endorsement thereon, endorsed by Anna M. Wilson to the plaintiff.

The cause was tried to the court, who found for the defendant and dismissed the action at the cost of the plaintiff, who brings the cause to this court on appeal.

The contention in this court is between the plaintiff and the defendant Oberman, the latter contending that the former cannot maintain his action against him, for the reason that at the time of the sale and conveyance to him of the premises, his co-defendants, Hoagland Brothers and the Chicago Lumber Company, each held judgments against W. F. Wilson, amounting in the aggregate to more than the amount of his note and mortgage, and that suits in the nature of creditor's bills were then pending against said Anna M. Wilson and W. F. Wilson, in the proper court,

for the purpose of having said judgments declared to be liens upon said land, which said suits have since ripened into a judgment or judgments and been declared a lien or liens on the said lands. Had the action been brought by Anna M. Wilson as the payee of the said note, it cannot be doubted that the above defense would be good. So also if the note is held to be in form non-negotiable, or was not endorsed to the plaintiff before maturity for a valuable consideration, in the usual course of trade, and without knowledge of the foregoing facts, which it is assumed would impeach its validity as between the maker and payee.

It is not urged by the appellee in this court that the note is not negotiable in form. But it having been urged in the court below, and a considerable part of appellant's brief being devoted to that point, it is but fair to say that the note, as to form, no doubt complies with all the essential requisites of a negotiable promissory note. "An open promise in writing by one person to pay another person therein named, or to his order or to bearer, a specified sum of money absolutely and at all events." 1 Dan. Neg. Ins., § 28. It matters not, then, that it also contains a promise to pay sooner than the general date of payment upon the happening of an uncertain event.

It is evident that the note was endorsed before the first day of March, 1883, the general day of payment, and there being no evidence of the delivery of the possession of the land in question to the defendant, so as to render the note due by the terms of the special provision, it cannot be contended that the note was past due or dishonored when endorsed to the plaintiff.

It is evident, therefore, that the learned court which rendered the finding and judgment against the plaintiff must have believed from the evidence that the note was not received by him in the usual course of trade for a valuable consideration, paid *bona fide*, and without notice of

the antecedent facts which would amount to a defense as between the original parties.

The rule of law applicable to this case is assumed to be correctly laid down in the cases cited by counsel for appellant. "To defeat his recovery thereon it is not sufficient to show that he took it under circumstances which ought to excite suspicion in the mind of a prudent man. To have that effect it must be shown that he took the paper under circumstances showing bad faith or want of honesty on his part." *Johnson v. Way*, 27 O. S., 374.

It should be borne in mind that the appellee does not place his defense on the ground of *gross negligence*, but upon the ground of *mala fides*. In his answer he alleges that the plaintiff, "with the said Anna M. Wilson and her son Frank Wilson, and said W. F. Wilson, have conspired together fraudulently and deceitfully to cheat and defraud the said Oberman," etc. So that the defendant must fail in his defense unless there was evidence to sustain a finding by the trial court that the plaintiff knew the facts upon which the defense is founded at or before the time of the endorsement to him of the note.

The evidence on this point is chiefly circumstantial. But this is no objection if it is sufficiently convincing. In the case of *Johnson v. Way*, *supra*, the court, in the opinion, say: "Circumstances tending to show bad faith or fraud in taking such paper, though not conclusive in themselves are admissible in evidence; and the establishment of such bad faith or fraud, whether by direct or circumstantial evidence, subjects the holder of paper so taken to defenses existing between antecedent parties."

Anna M. Wilson was, throughout the transaction of selling the land in question and taking the note and mortgage to secure the sum of four hundred dollars, part of the purchase money therefor, represented by her son, Frank Wilson, who was her agent for that purpose.

It appears from the evidence offered by both parties that

this man Frank Wilson and the plaintiff were, at the date of this transaction, partners, carrying on a second-hand store in the city of Lincoln, and were both personally engaged in tending the said store; and it appears from testimony offered on the part of the defendant that the said negotiation and trade between the defendant and the said Frank Wilson, as agent for said Anna M. Wilson, was in part had and made by and between the defendant and the said agent, Frank Wilson, at the said store.

Colonel J. E. Philpott testified on the part of the defendant that on the seventh day of October, in the afternoon, after the completion of the trade, the passing of the deed between the parties, and the delivery of the note and mortgage by the defendant to the said Anna M. Wilson, and after the defendant had discovered the pendency of the suits of Hoagland Brothers and the Chicago Lumber Company against W. F. Wilson and Anna M. Wilson for the purpose of establishing their several liens upon the said land, he, the witness, L. W. Billingsley, and Dr. Shaw, on the part of the defendant, went to the said store of Frank Wilson and plaintiff, and witness, as spokesman of the party, enquired for Frank Wilson, and he being pointed out to him by defendant, that the witness, being some ten or twelve feet from said Frank Wilson and about the same distance from the plaintiff, asked said Frank Wilson if he was the son of Anna M. Wilson, and the person who transacted the business in reference to the land in controversy for her. That Wilson replied in the presence of plaintiff, who was standing behind the counter ten to twelve feet distant from witness and Frank Wilson, the two latter being in front of the counter, and witness nearer to the plaintiff than Wilson, Wilson replied, "I am the party who transacted the business;" and while the parties were all sustaining the same relative position towards each other witness said to Frank Wilson, "I appear as the attorney of Mr. Oberman who bought some land from your mother

through you, and he is just informed that there is a suit pending against it for four hundred dollars or more." Wilson said, "I am busy now, and haven't time to attend to it now." Witness said, "Then I will wait on you for a time." That Wilson, who was waiting on some customers, stepped out upon the sidewalk with the customers. After waiting for some minutes witness went out also and renewed the conversation, and during that conversation plaintiff, in the witness's words, "again appeared, and what he heard I do not know."

The defendant, Frank H. Oberman, was sworn as a witness on his own behalf; but although he was present at the above interview with Frank Wilson, and testifies in relation to it, he states nothing which tends to prove knowledge on the part of plaintiff of the alleged defense to the said note and mortgage. Nor is there any evidence in the case other than the above testimony of Col. Philpott tending to prove such knowledge.

On the other hand, the plaintiff, who was sworn as a witness on his own behalf, testified that he first saw the note and mortgage on the ninth day of October, 1882, in the second-hand store No. 138 South Tenth st., Lincoln, that he bought them and they were handed him by Miss Wilson. Witness continued: "Frank Wilson told me his mother had a note and mortgage for \$400 which she wanted to sell, secured on real estate. I told him I would buy it if I could get it right. He told me it was drawing seven per cent interest, and she would make a discount of five per cent, and said he would see his mother. This conversation took place on Saturday. He said he would send the papers up with one of her daughters on Monday following; that she would take the \$380. Monday afternoon witness Alva Wilson came up with the papers. It was 3:30 or 4 o'clock in the afternoon. I looked over the papers and saw they were right, the note and mortgage and the order." An order signed by Anna M. Wilson on defendant to pay

Dobbins v. Oberman.

the bearer \$380 for the papers. "I went to the safe, opened my drawer and took out the money. Part of this money was my own, no part belonged to the parties. Some belonged to a young man named Chas. I. Dobbins, working on the railroad; part to a young man named Butts; I think \$20 belonged to ———. I held all this money in trust. I thought I would invest it, and in March get it back. * * * The negotiation for this note and mortgage commenced on Saturday before the ninth of October, 1882." Witness continues at considerable length to state how he paid the money for said note and mortgage, and called a witness to see him pay it because he doubted Miss Wilson, the person to whom he was paying it, "being of age." In answer to the question, "What knowledge, if any, had you at this time of any suit or suits having been brought or then pending concerning the land covered by this mortgage" Witness answered, "I had no such knowledge." And to the question, "What knowledge, if any, had you at this time of any claim of the defendants, Hoagland Brothers and the Chicago Lumber Company, against the land covered by this mortgage?" he answered, "I had no such knowledge." Also to the question, "What knowledge had you of any of the transactions between Hoagland Brothers and the Chicago Lumber Company and Wilson, or between Mrs. Wilson and Oberman?" he answered, "I had no knowledge."

The foregoing is all the evidence in the case which sheds any light on the question of the good faith, or otherwise, with which plaintiff purchased the note and mortgage. I should add, however, as counsel seem to place some reliance upon the point, that plaintiff also stated, when giving his testimony, that he was not engaged in buying notes or mortgages or dealing in any kind of securities.

The question is, did the plaintiff receive the note *bona fide*, without knowledge of the facts which it is assumed would constitute a defense to it in the hands of the payee?

If the above testimony is strictly contradictory, then the trial court was obliged to believe that of one of the witnesses and reject that of the other as untrue. But, on the other hand, if the testimony could be reconciled so as to render the whole of it susceptible of belief, then it was clearly the duty of the court sitting as a jury so to do. The witnesses are both credible, and must be believed, if possible.

The testimony of Colonel Philpott, standing alone, is sufficient to raise a fair presumption that the plaintiff had notice of the facts relied upon as a defense. Yet it is to be regretted that it was not fuller than it was. The witness, the plaintiff, and Frank Wilson, all being in the store and within ten or twelve feet of each other, if there was no crowd of other persons in the store, or confusion of any kind, and witness and Wilson conversed in their usual tone of voice, and the attention of plaintiff was not engrossed by other matters, then it is incredible that he did not hear the conversation, and if he did hear it he must have understood the facts, so as to render it impossible for him the same evening to enter upon a negotiation for the purchase of the note from Anna M. Wilson in good faith. It seems to me that witness might have disposed of these difficulties in his testimony, unless there was some inherent difficulty in the facts. But reading the testimony as it is returned by the referee, and was considered by the trial court, every word of it may be strictly true, and still the plaintiff may not have heard, much less have understood, the conversation between witness and Wilson, and may have remained in utter ignorance of the defense of defendant to the said note.

On the other hand, the testimony of the plaintiff, while chiefly negative in its character, and hence the weakest species of evidence, yet if it be believed is entirely inconsistent with his having had such knowledge of the facts in the case as forbid his purchasing the note in entire good faith.

Sawyer v. Brown.

The above considerations lead to the conclusion that the judgment of the court below cannot be sustained. Although not the usual course, and a practice which will not usually be pursued, yet owing to the peculiar manner in which this cause was tried in the court below, the cause is remanded to the district court for a new trial. The costs, except those in this court, to abide the result.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	171
31	790
17	171
38	566

ANDREW J. SAWYER, PLAINTIFF IN ERROR, V. LEANDER BROWN, DEFENDANT IN ERROR.

Appeal to District Court. Where on appeal to the district court the defendant answers the cause of action set forth in the plaintiff's petition without objection that it is not the same as was tried in the court from which the appeal is taken, he will be deemed to have waived all objections upon that ground.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

A. J. Sawyer, pro se (Foxworthy & Son with him).

S. T. Cochran and J. L. Caldwell, for defendant in error.

MAXWELL, J.

The defendant in error brought an action against the plaintiff, before a justice of the peace, to recover a specified sum "for work and labor" done by him for the plaintiff at his request. On the trial of the cause judgment was rendered against the plaintiff herein, and in favor of the defendant. The plaintiff then appealed to the district court, where the defendant in error also recovered judgment.

In the district court the defendant stated his cause of action as arising upon a verbal contract to plow for the plaintiff herein at the rate of \$2 per acre, and that in pursuance of said contract he plowed a specified number of acres, for which the plaintiff is still indebted to him. To this petition the plaintiff filed an answer admitting the contract and the price agreed upon, but alleging that the contract was to plow a certain piece of land—the contract being entire—and that the defendant has failed to complete said contract. There is also an allegation that the defendant agreed to “do a first-class job,” but has failed to do so.

The first objection made in the plaintiff’s brief is, that the “same issues” were not made in the plaintiff’s petition in the district court as before the justice. This objection was not made in the district court, either by motion before the answer was filed or by answer, although objections were made on the trial of the cause. Considerable space is taken up in the plaintiff’s brief with definitions of the words “teamster” and “plowman” as distinguished from “laborer,” to show that the cause of action in the district court was not the same as before the justice. Whatever distinction may exist between the phrase “work and labor” and the words “plowman” and “teamster,” this court will presume, in the absence of proof to the contrary, that the cause of action tried in the district court is substantially the same as was tried before the justice; and will not resort to nice distinctions in the meaning of words and phrases to defeat a cause of action to which the defendant joined issue without objection. The question should have been raised in the pleadings in the district court, and as it was not it cannot be considered here.

In *O’Leary v. Iskey*, 12 Neb., 136, the answer of the defendant in the county court was, that he had paid the notes sued on in full. On appeal he pleaded payment and a set-off for more than the face of the notes. The case was tried in the district court upon these issues, without

objection, and the judgment was sustained, although the set-off would have been stricken out of the answer if a motion to that effect had been made at the proper time. See also *Goodrich v. Omaha*, 11 Neb., 206. *R. V. Ry. Co. v. McPherson*, 12 Id., 481. The first objection therefore is untenable.

Second. Objections are made to the instructions given and refused. It would subserve no good purpose to review them at length, as the questions raised have been twice, at least, adjudicated in this court (*McMillan v. Malloy*, 10 Neb., 231; *Parcell v. McComber*, 11 Id., 210), and we adhere to those decisions. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE, EX REL. JAMES P. MILLER, PLAINTIFF IN
ERROR, V. MILTON SOVEREIGN, DEFENDANT IN ER-
ROR.

1. **County Clerk: NUMERICAL INDEX: FEES.** The numerical index of instruments affecting the title of real estate filed in the office of the county clerk, which he is required to keep, is a public record, and fees received by him for a certified copy of the same must be reported to the county board.
2. ———: ———: **MANDAMUS.** Where the law has provided a tribunal to which the county clerk is required to report the fees received by him by virtue of his office, it is the duty of such tribunal to require him to make such report, and a mere taxpayer cannot (unless it refuses to act) proceed against such clerk by mandamus to return certain fees in his report.

ERROR to the district court for York county. Tried below before NORVAL, J.

17	173.
19	568
23	453
17	178
30	577

Sedgwick & Power, for plaintiff in error.

France & Harlan, for defendant in error.

MAXWELL, J.

The defendant is county clerk of York county, and this action was brought by the relator, who is a resident and taxpayer of that county, to compel the defendant to include in his report of fees those received for abstracts of title. The court below found the issues in favor of the defendant and dismissed the action.

Sec. 78 of Chap. 18, Comp. Stat., provides that "the county clerk shall be *ex officio* register of deeds, and shall have the custody of, and safely keep and preserve all books, records, maps, and papers kept or deposited in his office; he shall also record, or cause to be recorded in suitable books, all deeds, mortgages, instruments, and writings authorized by law to be recorded in his office and left with him for that purpose." Sections 79 and 80 provide for an index and its form. Section 84 provides that "the county clerk shall keep an index as near as possible in the following form (giving form)."

Sec. 85 provides that "it shall be the duty of every person requiring any conveyance of realty, or interest therein, including mechanics' liens, to be entered upon said numerical index prior to the recording thereof, and no instrument shall be received for record by the county clerk until the same has been presented for transfer in said numerical index, and the fees provided by law for so entering the same on said index have been paid."

Sec. 86. "After such instrument has been so entered on said index, it shall be the duty of the county clerk to indorse on said instrument a certificate showing that the same has been indexed as herein required, and thereupon the clerk shall record said instrument as now provided by law."

Sec. 13 of chapter 28, Comp. Stat., provides that the county clerk shall receive "for recording deed, mortgage, or other instrument, for the first two hundred words seventy-five cents, for each ten words thereafter one cent. Copy of record, for each ten words one cent. Certificate and seal, twenty-five cents. Making abstract of title, for the first deed or transfer, one dollar; and for each additional deed or transfer, ten cents," etc.

Sec. 43 requires the clerk to make a report under oath to the board of county commissioners, on the first Tuesday of January, April, July, and October of each year, setting forth the different items of fees received, from whom, at what time, and for what service, and the total amount of fees received by such officers since the last report," etc.

It will be seen that the numerical index is made a public record upon which every instrument affecting the title to real estate, which the law requires to be filed in the clerk's office, must be entered before being recorded. In other words, each county is required to keep an abstract of the instruments affecting the titles to real estate as they appear of record in the clerk's office. The entering of such instruments on the numerical index is an official act of the clerk, for which he is allowed the sum of fifteen cents for each instrument as fees. He, in common with other officers, is required by section 409 of the code to give to any person on demand a certified copy of any public record in his custody, on payment of the legal fees therefor. This certainly applies to all copies of a public record. A certified copy of the numerical index of any particular piece of real estate made by the clerk or his deputy is an official act of such officer, for which the statute fixes the fees. We are not aware of any provision which exempts the officer from reporting all fees received by him, including those for copies of the numerical index. If the law can be evaded by claiming such fees as notary public, why may it not be extended to any record or docu-

ment in the custody of the clerk? Thus, as in this case, application is made to him or his deputy as *county clerk* for a certified copy of a public record, which is duly furnished, but certified by the deputy as *notary public*. This we think cannot be permitted. With the policy of the law requiring fees to be reported we have nothing to do. If the law is oppressive an appeal must be made to the legislature for its modification; but so long as it is in force it must be complied with.

Second. Objection is made to the right of the relator to maintain the action for the reason that he cannot directly require the defendant to account. The rule is well settled that where the action is one of public right, such as to require a justice of the peace to hold his office in the precinct where he was elected, or on the organization of a new county the special county commissioners to canvass the votes cast for the county seat, etc., any citizen may maintain the action. *State v. Shropshire*, 4 Neb., 411. *State v. Stearns*, 11 Id., 104. The reason is, that without the exercise of such power there is no assurance that the law will be enforced. But where the law has provided a tribunal having special jurisdiction of the subject matter, and to whom officers must account, we are not aware of any case holding that a mere taxpayer in the first instance may proceed directly against the officer for an account. The county board represent the county in its corporate capacity, and is expressly invested with authority to require the county clerk to render an account of the fees received. The presumption is that the board has done its duty, and there is nothing in either the pleadings or proof in this case to negative that presumption. What the right of a taxpayer may be in case of the refusal of the board to act it is unnecessary to determine, as the question is not before the court; but it is very clear that he cannot maintain the action until the board has refused to act. The case is substantially like that of a stockholder in a private corporation proceeding

against the directors of the corporation for neglect or abuse of their powers. In such case the corporation must either actually or virtually refuse to prosecute the action. 3 Pom. Eq., § 1095, and cases cited.

We hold, therefore, that the county board is the proper party to require the defendant to account, and that the relator cannot in the first instance, at least, maintain the action. The judgment of the district court dismissing the action is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SCHOOL DISTRICTS No. 17 AND 24, KEARNEY COUNTY,
PLAINTIFFS IN ERROR, V. SCHOOL DISTRICTS No. 2
AND 18, OF KEARNEY COUNTY, DEFENDANTS IN
ERROR.

Schools: DIVISION OF DISTRICT: ADJUSTMENT OF INDEBTEDNESS.

Under the school law in force in 1878, where a new district was formed in whole or in part from one or more districts possessed of a *school-house or other property*, it was the duty of the county superintendent to ascertain and determine the amount justly due to such new district from the district out of which it may have been in whole or in part formed, and no action can be maintained by the new against the old district to recover for its share of such property without such determination

ERROR to the district court for Kearney county. Tried below before GASLIN, J.

Sam. L. Savidge, for plaintiffs in error.

Calkins & Pratt and *Joel Hull*, for defendants in error.

MAXWELL, J.

In 1872 school district No. 2 of Kearney county was formed so that it comprised a large portion of that county. As thus organized, the district issued its bonds in the sum of \$3,000, with which a school-house was erected therein. At the annual school meeting in said district in 1877 a tax of fifteen mills on each dollar valuation was voted for the purpose of paying the debts of said district. In regard to this tax we find the following stipulation in the record: "It is hereby stipulated as a matter of fact, that the proceeds of the fifteen mills tax of 1877 received by the defendant district No. 2 was by said district used in paying bonds and indebtedness incurred before the 14th day of February, 1878, and that after applying the same as aforesaid there still remained fifteen hundred dollars bonded indebtedness incurred in 1873."

In February, 1878, school districts Nos. 17, 18, and 24 were duly organized out of the territory of No. 2, the value of the school-house at that time being about \$1,000. The county superintendent made no division of the property belonging to the old district, nor determined what amount it should pay to the new districts, and this action is brought to recover the amounts justly due. The court below found the issues in favor of the defendant and dismissed the action.

In *School District No. 9 v. School District No. 6*, 9 Neb., 331, and 13 Id., 166, where a school district which possessed no property of any kind was divided before the school tax was levied, and afterwards the tax was levied on the property of the new district as well as the old, that tax was collected and paid to the old district without authority of law so far as the amount collected on the property of the new district was concerned, and it was held that the amount thus wrongfully obtained could be recovered back. And we adhere to those decisions. Where,

however, a school district possesses property at the time a new district is formed out of its territory, it is the duty of the county superintendent to "ascertain and determine the amount justly due to such new district from any district or districts out of which it may have been in whole or in part formed," etc. Gen. St., 962.* This language is without limitation or restriction, and applies to all cases where the district has property. The superintendent is made the tribunal to determine the whole matter as justice may require. In this determination he may consider taxes then levied and to be collected from the district as it existed before the change was made, and so apportion the relative amounts, that justice may be done between the districts. He is invested with exclusive authority in the premises and must apportion the amount due to the plaintiffs before they can maintain an action. *Dudley v. Mayhew*, 3 Comstock, 9.

The practice in some of the newly settled portions of the state of including one or more townships of land in a school

* SEC. 7. When a new district is formed in whole or in part, from one or more districts possessed of a school-house, or other property, the county superintendent, at the time of forming such new district, or as soon thereafter as may be, shall ascertain and determine the amount justly due to such new district, from any district or districts out of which it may have been, in whole or in part formed, which amount shall be ascertained and determined according to the relative value of the taxable property in the respective parts of such former district or districts at the time of such division.

SEC. 8. The amount of such proportion, when so ascertained and determined, shall be certified by the county superintendent to the county clerk, who shall present the said amount to the county commissioners at the July session next succeeding, whose duty it shall be to assess the same upon the taxable property of the district retaining the school-house or other property of the former district, in the same manner as if the same had been authorized by a vote of such district, and the money so assessed shall be placed to the credit of the taxable property taken from the former district, and shall be in reduction of any tax imposed in the new district on said taxable property for school district purposes.

SEC. 9. When collected, such amount shall be paid over to the treasurer of the new district, to be applied to the use thereof in the same manner, under the direction of its proper officers, as if such sum had been voted and raised by said district for building a school-house or other district purposes.

district, for apparently the sole purpose of taxation, inflicts a great wrong upon those persons in the district so remote from the school-house as to be unable to avail themselves of school privileges. The remedy, however, is with the legislature and not with the courts. Where one or more new districts are formed out of a district possessed of a school-house or other property, the law has invested the county superintendent with ample powers to make a just and equitable division and apportionment of such property or its proceeds between the districts. If he neglects or refuses to make such apportionment, he may, in a proper case, be compelled to act. But until such apportionment is made no action can be maintained by one district against another for such property or its value. If, however, an action could be maintained without such apportionment, still the plaintiffs would not be entitled to recover, as the testimony fails to show that District No. 2 possessed any property in excess of the obligations incurred by it before the division, the property possessed by it being less than its indebtedness. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	180
25	147
17	180
38	419
17	180
48	549
17	180
44	532
17	180
48	84
17	180
50	773

JOHN PYLE, PLAINTIFF IN ERROR, V. MILTON RICHARDS
ET AL., DEFENDANTS IN ERROR.

1. **Water-course defined.** To constitute a water-course the size of the stream is not material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous.

2. ———. Where water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another landowner.
3. ———: DIVERSION OF STREAM: DAMAGES. Although surface water may accumulate in the channel of a stream which is dry a part of each year and greatly increase the flow of water at times, yet it will not defeat a recovery for injuries arising from from the diversion of the stream whereby its water was discharged over the land of another.

ERROR to the district court for Richardson county.
Tried below before GASLIN, J., sitting for BROADY, J.

Isham Reavis, for plaintiff in error, cited: *Angell Water Courses*, § 4. *Hoyt v. Hudson*, 27 Wis., 661. *Eulrick v. Richter*, 37 Wis., 226. *Cooley Torts*, 575. *Flagg v. Worcester*, 13 Gray, 601.

Edwin Falloon, for defendant in error, cited: *Davis v. Londgreen*, 8 Neb., 43. *Boyd v. Conklin*, 20 N. W. R., 598, and cases cited.

MAXWELL, J.

This action was brought by Richards against the plaintiff in error in the district court of Richardson county to recover damages for injury to his land by the alleged diversion of the course of a stream, whereby it discharged its waters on Richards' land. The answer was a general denial. The cause was tried to a jury and a verdict returned in favor of Richards, upon which judgment was rendered.

The first error assigned is, that the evidence is insufficient to sustain the verdict, as it is claimed that the proof fails to show the existence of a water-course, hence there could be no diversion.

The testimony tends to show the following facts: That the lands of the plaintiff and defendant are south of the Nemaha river in Richardson county, and that the A. & N.

Ry. runs nearly on the line between their respective tracts of land; that the plaintiff's land is south of and higher than that of the defendant; that one or more ravines extend some distance above the plaintiff's land, in which are certain springs from which during a great portion of the year flows a small stream. As stated by one witness, "In very dry weather once in awhile it went dry, or partially so; down at the road it sinks a great deal of the time; in wet weather it runs all the time." The natural course of this stream is north-east through the plaintiff's land. The plaintiff built a dam across this water-course, and made a new channel for the stream running north, so that its waters were discharged against the railroad, thence through what is designated in the testimony as the *west* culvert on the lands of the defendant. The testimony also tends to show that a large amount of surface water from melting snows or heavy rains also flows through said water-course.

To constitute a water-course the size of the stream is immaterial. It must be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be constant. *Shields v. Arndt*, 3 Green's Ch., 234. *Gillett v. Johnson*, 30 Conn., 180. *Bassett v. Manfg. Co.*, 43 N. H., 569. *Dudden v. Guardians, etc.*, 38 Eng. Law and Eq., 526.

In *Shields v. Arndt* it is said: "There must be water as well as land, and it must be a stream usually flowing in a particular direction. It need not flow continually, as many streams in this country are at times dry."

When water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner by the diversion. *Dudden v. Guardians, etc.*, 1 H. & N., 630. *Gillett v. Johnson*, 30 Conn., 180. *Luther v. Winnisimmel*, 9 Cush., 171. *Kaufman v. Griesemer*, 26 Penn. St., 407.

In our view, therefore, the verdict is responsive to the evidence, and this disposes of the second objection, that the plaintiff did nothing but obstruct the flow of surface water over his own land.

Objection is made to the third paragraph of the instructions, which is as follows :

"8d. If you find there was not a continuously flowing stream of water on the defendant's land, but you find there was a natural, well-marked, and defined channel in which water flowed a portion of the time, and was a natural receptacle for and in which surface water naturally accumulated and flowed, and you find the defendant constructed and erected a dam or obstruction across the same, thereby obstructing and accumulating water and preventing its natural flow, and you find that defendant cut a channel or ditch, so as to turn the said accumulated water upon said land of the plaintiffs, and thereby injured and damaged the same, you will find for the plaintiffs."

The court, in the second paragraph, had stated the rule as to a stream flowing continuously, and the evident object of the third paragraph was to state the rule in regard to a stream that did not flow continuously, although it might also become a receptacle and channel for surface water. Surface water usually finds its way into and is carried off by the natural water-courses ; and the fact that it accumulates in them, or greatly increases the flow of water at times, will not defeat a recovery. There is no error in the instruction. It is very clear that substantial justice has been done, and there is no error in the record. The judgment is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	184
27	630
17	184
31	10
17	184
40	107
17	184
50	327

**HIRAM W. SMITH, PLAINTIFF IN ERROR, v. WILLIAM
H. KAISER, DEFENDANT IN ERROR.**

1. **Bill of Exceptions: MOTION TO QUASH.** A party who moves to quash a bill of exceptions must specifically point out in his motion the objections complained of.
2. ———: **SIGNING: TIME OF TAKING.** Where the transcript shows that a bill of exceptions was taken during the trial of an action of forcible entry and detainer, it will be presumed to have been prepared at that time, although not signed till a few days afterwards.
3. ———: **OBJECTIONS WAIVED.** Where a bill of exceptions was submitted to the adverse party for correction, and amendments made to the same and then duly signed, *Held*, A waiver of all objections as to matters of form.
4. **Forcible Entry and Detention: DENIAL OF TITLE: JURISDICTION.** In an action of forcible entry and detainer a denial by the defendant of the plaintiff's title does not necessarily raise the question of title so as to oust a justice of the peace or county judge of jurisdiction, and the court may proceed with the trial until it is clear that the question of title is involved.
5. ———: **EVIDENCE.** A party may introduce a deed or deeds in evidence, when necessary to show his right to the possession of the premises.
6. ———: **RIGHTS OF ASSIGNEE OF LESSOR.** The assignee of the lessor may maintain the action against a tenant holding over after his term.

ERROR to the district court for Gage county. Tried below before WEAVER, J.

J. E. Bush and *J. N. Richards*, for plaintiff in error, cited: *Leach v. Sutphen*, 11 Neb., 527. *Main v. Cooper*, 25 N. Y., 186. *Winterfield v. Stauss*, 24 Wis., 394. *Bridewell v. Bancroft*, 4 W. L. M., 617. *Mecham v. McKay*, 37 Cal., 154. *Mitchell v. Davis*, 20 Cal., 47. Taylor's Landlord and Tenant, 790. *Gray v. Gray*, 8 Litt., 465. *Caswell v. Ward*, 2 Doug., 374.

Babcock & Davidson, for defendant in error, cited: Nebraska cases referred to in opinion. Taylor's Landlord and Tenant, 437, 439. *Perrin v. Lepper*, 34 Mich., 292. *Williams v. Sprigg*, 6 Ohio State, 585. *Carr v. Williams*, 10 Ohio, 810.

MAXWELL, J.

This is an action of forcible entry and detainer brought by the defendant against the plaintiff in the county court of Gage county. The action was commenced on the 6th day of March, 1882, and a trial had on the 22d of that month, a jury being waived. The case was taken under advisement by the court, and the judgment was rendered on the third day after the trial in favor of the plaintiff below (defendant in error). In the transcript we find the following: "William H. Kaiser, sworn in his own behalf. Various and numerous objections and exceptions were made during the trial of this cause, all of which duly appear in defendant's bill of exceptions allowed by the court." On the 31st of March, 1882, the attorneys for the plaintiff in error submitted the bill of exceptions to the attorneys for the defendant for correction. On the following day the defendant's attorneys returned the bill to the attorneys for the plaintiff with a large number of corrections, and the bill was signed by the judge on the third day of April 1882. The plaintiff then took the case on error to the district court, where, on motion of the defendant, the bill of exceptions was stricken from the files, the grounds of the motion being:

First, Because the same was not allowed and signed according to law.

Second, Because the county judge had no jurisdiction to sign and allow said bill of exceptions.

Third, Because said bill of exceptions is without any legal effect and validity.

The bill is in proper form, is duly signed by a judge who had authority to allow and sign a bill of exceptions in a case tried before him, and it is valid unless quashed for sufficient cause. And the specific cause or causes for quashing the same must be assigned in the motion. If not so assigned, the motion will be overruled, although causes not set forth in the motion may exist which would be fatal to the bill. Technical objections are not favored, and he who relies upon them must specifically point them out. This was not done in this case; the real objection apparently being that the bill was signed nine days after the judgment was rendered. But as no objection upon this ground was made, the court erred in sustaining the motion. But even if the cause stated had been assigned, still the motion should have been overruled. The bill, so far as appears, was duly prepared at the time of the trial. It was afterwards submitted to the defendant's attorneys for correction, and by them corrected and returned without objection—in other words, they assisted in perfecting the bill of exceptions, and thereby waived objections that it was not presented in time.

Second. Objection is made that the county court had no jurisdiction because the title to real estate was drawn in question. It appears from the record that the plaintiff in error was in possession of the premises as a tenant; that he entered into possession under a lease for one year from March 1st, 1881; that in September or October, 1881, he again leased the premises for a second year, commencing March 1st, 1882, and terminating March 1st, 1883, and that under this lease he plowed a portion of the land before the defendant purchased the same. That in October, 1882, the defendant purchased the land in controversy with full knowledge of the plaintiff's lease, and afterwards, on the 28th day of December, 1882, received a deed of conveyance for the premises. The plaintiff does not claim to have any interest in the land itself, but merely the right

of possession during the existence of the lease. There are no conflicting titles to the property, but a mere denial of the defendant's title. In such case a party may introduce a deed or deeds in evidence—not for the purpose of proving title, but to establish a right to the possession. *Pettit v. Black*, 13 Neb., 142. And the court may proceed with the trial until it is clear that title is drawn in question. *Id.* When this appears the action should be dismissed. *Id.* *Leach v. Sulphen*, 11 Neb., 528. *Streeter v. Rolph*, 13 *Id.*, 390. The rule in this state, at least, has been and is to admit evidence of title when necessary to establish the right to the possession of the premises.

Third. It is claimed by the attorneys for the plaintiff in error that the action will not lie in this case, there being no privity of contract between the plaintiff and defendant. But this objection is untenable. A party entitled to the possession as lessor or his assignee, after the termination of the tenancy of one who entered as tenant, may maintain an action to recover possession of the premises. In such case, as the tenant holds solely under his lease, upon its termination his right to the possession as against the landlord or his assignee ceases. The action, therefore, in a proper case, may be maintained by the assignee of the lessor.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

17	188
29	162
17	188
96	521
17	188
29	469
17	188
48	644
17	188
50	627
51	804
51	814
17	188
159	708

THE STATE OF NEBRASKA, EX REL. THOMAS B. STEVENSON, v. H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

Constitutional Law: AMENDMENTS TO CONSTITUTION. The votes necessary to adopt an amendment to the constitution under the provisions of sec. 1, Art. XV. of the same, must be a majority of all those cast in the state at that election for senators and representatives.

ORIGINAL application for mandamus.

J. N. Paul, W. H. Snell, A. C. Troup, E. H. Peterson, and M. L. Hayward, for relator, cited: *Gillespie v. Palmer*, 20 Wis., 572. *Dayton v. Saint Paul*, 22 Minn., 400. *County of Cass v. Johnston*, 5 Otto, 360. *Saint Joseph v. Rogers*, 16 Wall., 664. *People v. Garner*, 47 Ill., 523. *L. & N. R. R. v. County*, 1 Sneed, 691. *State v. Clark*, 54 Mo., 39. *People v. Wiant*, 48 Ill., 266. *County Seat of Linn County*, 15 Kan., 525.

William Leese, Attorney General, for respondent, cited: *Enyart v. Trustees*, 25 Ohio State, 618. *State v. Sutterfield*, 54 Mo., 391. *Everett v. Smith*, 22 Minn., 53. *State v. Swift*, 69 Ind., 505.

MAXWELL, J.

This is an application for a mandamus to compel the auditor to draw a warrant in favor of the relator at the rate of \$5.00 per day for services rendered by him as a member of the legislature. In 1883 the legislature submitted to the electors of the state the following proposition to amend the constitution: The term of office of members of the legislature shall be two years, and they shall receive a salary of three hundred dollars for their services during said term, and ten cents for every mile they shall travel in

going to and returning from the place of meeting of the legislature, on the most usual route; *Provided, however,* That neither members of the legislature nor employees shall receive any pay or perquisites other than their salary and mileage. Each session, except special sessions, shall be not less than sixty days. After the expiration of forty days of the session no bills nor joint resolutions of the nature of bills shall be introduced unless the governor shall by special message call the attention of the legislature to the necessity of passing a law on the subject matter embraced in the message, and the introduction of bills shall be restricted thereto; *Provided,* The ballots at said election shall be in the following form: "For proposed amendment to the constitution relating to legislative departments;" "Against proposed amendment to the constitution relating to legislative department." Section 1 of article XV. of the constitution provides: "Either branch of the legislature may propose amendments to this constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published once each week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this constitution." * * * It is agreed by the parties that the whole number of votes cast at the election in November, 1884, was 134,000 for governor and other state officers, and 132,000 for senators and representatives; and in favor of the proposed amendment 51,959, and 17,766 against the same. If the 51,959 votes cast in favor of the proposed amendment are sufficient to adopt the same and make it a part of the constitution, then the relator is entitled to the writ, otherwise not.

The language of section 1, article XV., is that "*if a majority of the electors voting at such election* adopt such amendments the same shall become a part of this constitution." This would seem to require a majority of all the votes cast at that election, otherwise the words "voting at such election" would be entirely without meaning. But these words evidently were intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein. And this view is strengthened by an examination of section 2, article XV., where it is provided that a new constitution, when "submitted to the electors of the state and adopted by a majority of those voting for and against the same, shall then take effect in the manner therein provided.

The question here involved was before this court in *State v. Lancaster County*, 6 Neb., 474. In that case the question of township organization was submitted to the electors of Lancaster county, and 952 votes were cast in favor of and 601 against the same, while the whole number of votes cast in the county at that election for the various officers voted for was 2,451.

Section 5, article X., of the constitution provides that "the legislature shall provide by general law for township organization, under which any county may organize whenever a majority of the legal voters of such county *voting at any general election* shall so determine." It was held that, as it required 1,226 votes to constitute a majority of all the voters who voted at such election, therefore township organization was not adopted.

In *People v. Brown*, 11 Ill., 479, the sixth section of the seventh article of the constitution of that state declared that "The General Assembly shall provide by a general law for a township organization, under which any county may organize whenever a majority of the voters of such county at any general election shall so determine." At

the general election in Woodford county in the year 1850 more than 600 votes were cast in the county, while but 153 votes were given for and 107 against township organization. The court say (page 480): "But one-fourth of the voters of Woodford county cast their suffrages in favor of township organization. It is clear, therefore, that the township law has not been legally adopted in that county."

In *Enyart v. Trustees, etc.*, 25 Ohio State, 618, the act of the legislature authorized the trustees of a township to levy a special tax for the purposes stated in the act, but with a proviso "that said trustees shall not cause said levy to be made until a majority of the electors of said township at some regular election shall vote in favor of said levy." The election at which the question of levying the tax was submitted was a presidential election, and it was held by the supreme court of Ohio that the votes cast for President and Vice-President furnished the basis by which it was to be determined whether or not the levy was authorized. In the opinion "by the court" it is said "The record shows that although the number of votes in favor of levying the tax was a majority of the votes cast on that question, they were not a majority of all the votes cast for electors of of President and Vice-President, and hence the levy was never authorized."

The case of *The People v. Wiant*, 48 Ills., 263, was an application for a mandamus to compel the county treasurer to remove his office to the town of Wheaton, which, it was alleged, had been recently selected as the county seat of Du Page county. The act under which the election was held provided that if it should appear upon a canvass of the votes that a majority of the legal voters of the county had voted for the removal to Wheaton, then that place should be the county seat of said county. The returns of the election showed that more votes were cast for the selection of a circuit judge than upon the question of the re-

moval of the county seat; and that while a majority of the votes cast upon the question of county seat removal were in favor of such removal, yet there was not a majority of the whole vote cast and the mandamus was denied.

Walker, J., in delivering the opinion of the court, said: "It is not the vote cast upon that single question that is to govern, where it occurs at any other election held at the same time, but it must appear that a majority of all the votes cast at that election were in favor of the removal."

In *The State v. Winkelmeir*, 35 Missouri, 103, the legislature had given permission to the county of St. Louis to allow the sale of refreshments on any day of the week when authorized by a majority of the legal voters of the respective cities. Five thousand votes were cast for such permission out of thirteen thousand cast for city officers at the election on the same day, it was held not the vote of a majority, although only two thousand votes were cast against the proposition, and that no authority for such sales were given by the election.

In *Everett v. Smith*, 22 Minn., 53, the constitution of the state declared that "all laws for removing county seats shall, before taking effect, be submitted to the electors of the county or counties to be affected thereby at the next general election after the passage thereof, and be adopted by a majority of such electors." It was held by the supreme court "that the words 'majority of such electors' as used in the provision of the constitution mean a majority of the electors voting at the election." And the same was held in *Taylor v. Taylor*, 10 Minn., 107, and in *Bayard v. Klinge*, 16 Id., 249.

It may be seen by reference to *Redden v. Smith*, *supra*, the construction placed upon the language of the constitution of Minnesota is in exact accordance with the language of the clause of the constitution of Nebraska now under consideration, viz., "a majority of the electors voting at such election." And in *Bayard v. Klinge*, *supra*, the legis-

lature had passed an act for the removal of the county seat of Wabasha county from Wabasha to Lake City, but by the seventh section of said act it was provided that the act should take effect and be in force after its submission "to the election of said county at the next general election after the passage thereof, and its adoption by a majority of such electors voting thereon." The court held the act of the legislature to be in contravention of the constitution, and that the language of the constitution and of the act of the legislature were not of the same meaning. The court, by Chief Justice Ripley, say: "Hence, considering that the constitution requires such law to be submitted to the electors at a general election; that the returns would show the actual number of persons present at such election *voting on any question*; that as a general rule it is the duty of every elector to attend and vote at such general election; and that the law presumes that every citizen does his duty,—they (the court) hold that in the eye of the law those present and voting at such election, not on any such question then submitted, but on any question then to be voted on, constitute the electors of the county, in the sense in which article 11, § 1, of the constitution uses those words; that is to say, that body, the adoption by a majority of whom, of such a law as is there referred to, would be the adoption thereof by a majority of the electors of the county." Again the court in that case, in speaking of the great length which the respondent desires it to go, say: That he would have it annul the former decision of the court in *Taylor v. Taylor* "by holding that 'a majority of such electors' does not mean a majority of those voting thereat, but a majority of those who may see fit to vote thereat on this particular question. We see nothing either in principle or authority to justify us in so doing."

While we cannot endorse some of the reasoning in the opinion of the majority of the court in *The State v. Swift*, 69 Ind., 505, yet that case fully sustains the principle here

contended for. Indeed we are supported by the dissenting opinion of Niblock, J. In that case the act by which the proposed constitutional amendments were submitted provided that it should be so submitted at the election to be held in April, 1880, for their adoption or rejection, and that "if a majority of the electors shall thus ratify any of said amendments the same shall be a part of the constitution." The April election was the township election. No state officers were voted for. The question of the amendments were the only questions requiring a state canvass of the votes. It would seem that the only criterion by which the vote of the state could be ascertained was the vote upon that question. Yet it was held that the amendments were defeated, because it did not affirmatively appear that a majority of the votes cast at the election were in favor of the amendments, notwithstanding the fact that a majority of over seventeen thousand votes were in favor of the amendments. The dissenting opinion of Niblock, J., at page 531, lays down the rule that a majority of the votes cast is sufficient, unless there be some statutory or constitutional provision to the contrary. In this case we have the constitutional provision, clear, concise, and unambiguous. It must be "a majority of the electors voting at such election." The returns of the election furnish an infallible criterion by which that majority can be ascertained, and it will not do to say that the term "election" in that sentence refers to the vote upon the question of the adoption of the amendment instead of the election of senators and representatives.

The case of *Gillespie v. Palmer*, 20 Wis., 572, and *Stanford v. Prentice*, 28 Id., 358, were carefully considered by this court in *State v. Lancaster Co.*, 6 Neb., 474, and we then refused to follow them, the court being unanimous. We entertain high regard for that able court; and its decisions are entitled to great weight, but we are unable to give our assent to the views expressed in the cases cited, and see no good reason for overruling our decision in *State*

v. Lancaster County. In that case township organization was to be adopted "whenever a majority of the legal voters of such county voting at any general election shall so determine." In this case an amendment to the constitution will be adopted "if a majority of the electors voting at such election adopt" the same. This requires affirmative action. A majority of all those voting at the election must vote in favor of the proposition in order to adopt the same. The convention that framed the constitution doubtless presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption, hence, before an amendment can be submitted to the people, at least three-fifths of the members elected to each house must agree to the proposed amendment. It must then be submitted to the electors for approval or rejection. The submission must be at an election when senators and representatives are to be elected, and a majority of those voting at such election are required to vote in favor of the proposition to adopt the same. The words "such election" evidently refer to the election for senators and representatives.

The rule of construction, as applied to statutes and constitution, is to compare and consider the several parts of the section, act, or article, as the case may be, and deduce therefrom the purpose and intent of the law-giver. *State v. Gosper et al.*, 3 Neb., 285. Applying this rule to section 1, Art. XV., we have no doubt a majority of all the votes cast at the election was intended. In the absence of a statute or constitutional provision requiring a majority of all the votes cast to be in favor of a proposition, there is no doubt that a majority voting upon that question would be sufficient. In such case, no doubt, the failure of a party to vote upon the question may be considered as tacit assent to the will of the majority of those voting thereon; but such a rule cannot apply where a majority of the electors of the state voting at the election are required to vote in

favor of a proposition to secure its adoption. In such case the votes in the affirmative must exceed one-half of the total of the votes cast for senators and representatives.

It is a matter of regret to the members of this court that we are compelled to make this decision, as it must be conceded that the time allowed for a session of the legislature is inadequate, and the compensation of the members far below what it should be. But while we lament the result of the election, it is not within the power of the court to change that result. It is not the duty of the court to say what the result *should* have been or must be, but to ascertain what that result *has* been, and in the light of the constitution the former decisions of this court, and the well-considered decisions of other courts on similar questions, declare the law as we find it.

We hold, therefore, that the amendment, not having received the approval of a majority of the electors voting at the election at which it was submitted, was not adopted. The writ must therefore be denied.

WRIT DENIED.

REESE, J., concurs.

COBB, CH. J., dissenting.

Being unable to concur in the opinion of the majority of the court, and having no disposition to criticise it, I will content myself with a brief statement of my views of the question submitted, with the preliminary statement that it is the duty of the court, and of each member of it, to expound the constitution as they understand it, without regard to questions of convenience, the responsibility for which rests with the people of the state in their political capacity.

The sole question presented for our consideration is, whether, under the provision of the constitution providing

for its own amendment, it is sufficient that the proposed amendment receive a majority of the votes cast for and against it, or is it necessary that it receive a majority of the votes for and against that proposition, or the several candidates for that office, voted upon at the same time, upon which the greatest number of electors exercised the rights of voting. The section of the constitution directly governing the question under consideration is as follows: "Article XV., section 1. Either branch of the legislature may propose amendments to the constitution, and if the same be agreed to by three-fifths of the members elected to each house, such proposed amendments shall be entered on the journals, with the yeas and nays, and published at least once each week in at least one newspaper in each county where a newspaper is published for three months immediately preceding the next election of senators and representatives, at which election the same shall be submitted to the electors for approval or rejection, and if a majority of the electors voting at such election adopt such amendments, the same shall become a part of this constitution." * * *

Now, in what sense is the word election, when last used in this section, to be understood? Is it to be confined to that general sense in which we speak of a certain day, between certain hours, the polling places, the inspectors and clerks, the poll books, ballot boxes, ballots, etc., as the election, or does it not mean that choosing between the adoption or the rejection of the proposition submitted, which is the object and purpose of the submission?

The word election is defined by Webster as follows:

1. The act of choosing; choice; the act of selecting one or more from others.
2. The act of choosing a person to fill an office or employment, by any manifestation of preference, as by ballot, uplifted hands, or *viva voce*; as the election of a president or a mayor.

If this authority be accepted, then the words "at such

election" must be construed to mean the same as though it read "at such act of choosing, to-wit, at the act of adopting or rejecting the proposed amendment." And, looking at the language of the constitution, I think that any other construction is strained and artificial.

In an adjudicated case, *Commonwealth v. Kirk*, 4 B. Monroe, 1, the supreme court of Kentucky has construed the word election as used in the statute of that state, and given it a meaning consistent with the above. The case arose upon an indictment against one Kirk for betting with another person a certain sum of money that one Dobyns, who was a candidate for representative, would not receive six hundred and fifty votes for said office. The statute under which the indictment was found provided "That if any person shall wager or bet any sum of money or other thing upon the election of the officers aforesaid (among whom are members of the general assembly), within six months next before said election, he shall forfeit and pay the sum of one hundred dollars, to be recovered by indictment." The court, in construing the said act, used the following language. "An election is the voting and the taking of the votes of the citizens," etc.

Let us read that part of the section of our constitution applicable to the question under consideration, substituting for the word "election," where it last occurs therein, the words of the court in the above case: "And if a majority of the electors voting at such voting, and the taking of the votes of the citizens, adopt such amendments, the same shall become a part of this constitution." Read in this way the mind is confined to the expression of the voters upon the question submitted to them for adoption or rejection, without reference to the other proceedings, which in my judgment are only named for the purpose of designating the time as the proper one for the submission of such question for that purpose.

Section 1 of article 3 of the constitution of Wisconsin

provides that white male persons over the age of twenty-one years, who have resided in that state one year next preceding any election, and who are citizens of the United States, or have declared their intentions to become citizens, and also certain persons of Indian blood, shall be deemed qualified electors at such election. Then follows a proviso in the following words: "*Provided*, That the legislature may at any time extend by law the rights of suffrage to persons not herein enumerated; but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election."

An act was passed by the legislature of that state, pursuant to the above proviso, and submitted to the people at a general election, at which there were 5,265 votes cast for said law and 4,075 against it, while there were at least thirty thousand votes cast for and against the state officers elected at the said election.

The case of *Gillespie v. Palmer*, 20 Wis. R., 572, arose under the above law; the plaintiff, a mulatto, having offered to vote at a subsequent election, and his vote having been rejected by the defendant and others, inspectors of the election.

The sole question was, whether the law had been approved by a sufficient majority. The united court were of the opinion that it had been, and I think the reasons for the opinion given by Judge Downer and Chief Justice Dixon are quite satisfactory; and, while it is not my purpose to further comment on that case, I will observe that the language of the proviso construed by them is scarcely distinguishable from that of the section of our constitution now under consideration. The above case was followed and expressly approved in the same court in the case of *Stanford v. Prentice*, 28 Id., 358.

The case of the *State v. Swift*, 69 Ind. R., 505, relied on by the attorney general, counsel for respondent, is a

strong case for that side, and still it cannot be admitted that the language of the section of the constitution of that state, construed by the court in that case, is the same as that of our own now under consideration. There, after providing for the proposed amendments being agreed to by a majority of the members elected to each house and referred to the general assembly next to be chosen, the section continues, "and if, in the general assembly so next chosen, such amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of general assembly to submit such amendment or amendments to the electors of the state, and if a majority of said electors shall ratify the same, such amendment or amendments shall become a part of this constitution."

It is noticeable that neither the word election or voter occurs throughout the section as applicable to the adoption of the amendments. The word election is not exactly the equivalent of the word voter. As said by Ch. J. Dixon in *Stanford v. Prentice*, *supra*: "The primary and proper signification of the words 'legal voter' is, persons qualified by law to vote, and who do vote. There is a difference between an elector or person legally qualified to vote and a voter. In common parlance they may be used indiscriminately, but strictly speaking they are not the same. The voter is the elector who votes—the elector in the exercise of his franchise or privilege of voting—and not he who does not vote."

Again, it will be noticed that the decision in the Indiana case is predicated mainly upon the intention of the convention which framed the constitution, as shown by the debates and amendments to the section adopted and rejected, and not upon the language itself. The former source of interpretation is denied us, as no record of the debates of our convention was preserved.

I do not think that any purpose would be subserved by

a discussion of the cases cited by counsel where in the several states of Ohio, Illinois, Missouri, Kansas, Minnesota, and our own state the supreme courts have construed their several statutes providing for submitting to the people of questions for the removal of county seats, the adoption of the township system of government, making donations to works of internal improvement, and similar matters. In none of them is the language construed the same as that of the section of our constitution now being considered, and while I do not claim that the majority of them sustain the position of the relator, I by no means concede that they are against him.

I am of the opinion that the so-called legislative amendment was adopted by a sufficient majority and has become a part of the constitution, and that the relator is entitled to the writ of mandamus.

THE STATE OF NEBRASKA, EX REL. REDMOND CLEARY,
V. CALVIN RUSSELL.

17	201
59	559
59	585

1. **Stay of Execution: BOND MAY BE AMENDED.** The filing of a stay bond under the provisions of section 477c of the civil code is such a proceeding as is referred to in the last clause of section 144 of the code, and such bond may be amended.
2. ———: ———. Where a judgment debtor has in good faith, and within the time provided by law, filed a bond for stay of execution, and which bond has been approved by the proper approving officer, notice of such approval being given such debtor; and where it is afterwards ascertained that such bond fails to conform to the requirements of law, and upon application being made upon notice or leave to amend, and such leave being granted by the court, and the defective bond being amended, such amended bond, upon an application for a mandamus to compel the issuance of an execution will be held good, and a writ of mandamus denied.

ORIGINAL application for mandamus.

E. H. Wooley, for relators.

Beeson & Sullivan, for respondent.

REESÉ, J.

This is an application to this court in the exercise of its original jurisdiction for a writ of mandamus to the respondent, who is the county judge of Cass county, requiring him to issue an execution upon a judgment in the county court. From the record in the case the following facts appear:

On the 26th day of September, 1884, Redmond Cleary & Co. recovered a judgment by confession in said county court against John M. Carter and William Barbour for the sum of \$271.22. On the second day of October, and within the time required by law, the defendants filed a bond for stay of execution, which was approved by respondent. This bond was in due form, and in all things complied with the requirements of law, with the exception that it was signed only by one surety instead of by two, as required by section 477c of the civil code. On the 18th day of the same month, twenty days having expired, the judgment plaintiff appeared and demanded the issuance of an execution notwithstanding the stay bond, upon the ground that there was but one surety. Execution was accordingly issued and delivered to the proper officer. On the 20th day of October the judgment defendants appeared and moved the court for leave to amend the stay bond by procuring additional signers, thereby correcting the irregularity or defect in the bond. The hearing of the motion for leave to amend was fixed for the 23d day of October, and notice thereof was given the judgment plaintiff. On the day set for hearing the motion both parties

appeared. The surety who had signed the bond filed his consent to the amendment of the stay bond by the addition of other sureties, and agreeing still to be bound thereby. The record recites, that "after hearing the argument of counsel the court decided to sustain said motion, to which ruling plaintiff excepts; whereupon said bond was amended by the signing of the same by other persons, which bond, after being signed by J. M. Carter, W. M. Barbour, and Wilbourne L. Barrett, was approved by the court."

The question presented is, whether or not the county court had authority to permit the amendment of the stay bond after the expiration of twenty days from the rendition of the judgment, and whether the bond as amended is void. We think it is clear that the county court possessed the authority, and that the amended bond is valid, not only as a common law obligation, but as a statutory undertaking. The question of good faith does not enter into this case. The judgment defendants and the county judge appear to have acted in the best of faith throughout, and the omission was caused only by a misapprehension of the law.

Since the decision of this court in *O'Dea v. Washington County*, 3 Neb., 118, it would seem that the question as to whether the execution, approving, and filing of a bond or undertaking in the progress of an action, at any stage of the case, is a "proceeding" under the provisions of section 144 of the civil code, is virtually at rest. That section is as follows: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting other allegations material to the case; or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved. And whenever any

proceeding taken by a party fails to conform, in any respect, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment." If it is true, as said in *O'Dea v. Washington County*, *supra*, that the construction of the term "proceeding" as given in *Irwin v. Bank*, 6 Ohio State, 81, "is in full accord with the liberal spirit in which our code was framed and which seems to pervade it throughout," then it would seem that the mere citation of the section above quoted, and the decisions above referred to, should be sufficient. One of the great purposes to be accomplished by the code is the breaking down of the technical rules of the common law, by which rights, however important, were sacrificed by the failure of a "proceeding taken by a party" to conform to the provisions and requirements of law. The section above quoted is sweeping in its terms. "Whenever *any* proceeding taken fails to conform, *in any respect*, to the provisions of this code, the court may permit the same to be made conformable thereto by amendment."

Section one of the code provides that "The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. Its provisions and all proceedings under it shall be liberally construed with a view to promote its object and assist the parties in obtaining justice."

The code gives to all judgment debtors the right to obtain a stay of execution and prevent the sacrifice of their property by adopting the proceedings provided by the code for that purpose. If the proceeding fails "*in any respect*" to conform to the provisions of the code, the court may permit it to be amended. Section 144, *supra*. This the court did after full notice to, and appearance by, all the parties to the action. Its action was in accordance with both the letter and spirit of the code, and was correct. The judgment debtor, having complied with the law, is entitled to the stay of execution. The respondent had no author-

 Albrecht v. Treitschke.

ity to issue an execution after the amendment of the stay bond, and was correct in his refusal so to do. The writ of mandamus must therefore be denied.

WRIT DENIED.

THE other judges concur.

FREDERICK R. ALBRECHT, PLAINTIFF IN ERROR, v.
JULIUS TREITSCHKE, DEFENDANT IN ERROR.

17	205
23	754
17	205
26	657
17	205
31	634
17	205
37	270

Exemption: GARNISHMENT OF LABORER'S WAGES. Where a judgment creditor procures the exempt wages due a laborer to be taken by garnishee process and applied to the payment of his judgment, a cause of action arises in favor of the judgment debtor against the creditor for the amount of such wages wrongfully appropriated, unless the right of exemption is waived by the debtor.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

J. J. O'Conner and Charles H. Brown, for plaintiff in error.

Redick & Redick, for defendant in error.

REESE, J.

Plaintiff in error filed his petition in the district court, alleging substantially that he was the head of a family and had been for several years, being a married man and a resident of Douglas county, and that he lived with and provided for his family by day labor in the employment of the Omaha Smelting and Refining Company. That his only income and means for the support of himself and

family was the wages earned by him in his said employment as laborer. That on the 4th day of September, 1880, the Smelting Company was indebted to him in the sum of \$31.40 for labor performed by him within the sixty days immediately preceding said date, and that his wages so due and owing to him from the said company were exempt from seizure by attachment, execution, and garnishee process. That at said time the defendant Treitschke had a judgment against him upon the docket of Charles Brandes, a justice of the peace, for the sum of \$17.55 and costs of suit, amounting to \$2.85; and on the 30th day of November, 1880, without his knowledge the said Treitschke procured a garnishee process to be issued by said justice of the peace to the said Smelting Company, requiring it to appear and answer as a garnishee, touching its indebtedness to him. That the company, by its proper agent, appeared and answered disclosing said indebtedness. Whereupon the said justice made an order requiring the company to pay said money into court for the benefit of Treitschke. That Treitschke immediately procured from the justice of the peace a copy of that order, called upon the paymaster of the Smelting Company and obtained the money so ordered to be paid, which was the sum of \$25.05, notwithstanding the same was exempt to him by law. The petition alleges further that plaintiff had no knowledge of any of the proceedings in garnishment until after the money had been so paid, and that he was kept in ignorance of that fact by the contrivance and conspiracy of Treitschke and the justice of the peace. He therefore seeks to recover back from Treitschke the money so wrongfully obtained.

A general demurrer was filed in the district court to the petition, which was sustained, and to which the plaintiff excepted. He now assigns the ruling of the court for error and seeks a reversal of the judgment.

There is but one question presented by this case for decision, and that is, whether or not he can recover back from

 Tessier v. Crowley.

Treitschke the money obtained from his employer. It is provided by section 531a of the civil code that the wages of laborers, who are heads of families, in the hands of those by whom such laborers may be employed, both before and after such wages shall be due, shall be exempt from the operation of attachment, execution, and garnishee process, but that not more than sixty days' wages shall be thus exempt. The petition brings the plaintiff within the provisions of this section. By the demurrer the allegations of the petition are admitted to be true. It is clear that the wages of plaintiff were exempt from execution or garnishee process. It is well settled that if exempt property is seized and applied to the payment of a judgment the owner may have his action against the wrong-doer, unless such exemption is waived by some act or omission of the debtor. *Haswell v. Parsons*, 15 Cal., 266. The wrong-doer in this case was the defendant. He has procured property to be applied to the payment of his judgment to which he was not entitled. He must refund it. *Phillips v. Hunter*, 2 H. Bla., 402.

The demurrer should have been overruled. The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

LEWIS TESSIER, PLAINTIFF IN ERROR, V. A. CROWLEY,
DEFENDANT IN ERROR.

17	207
142	824
17	207
59	360

1. **Attachment: UNDERTAKING.** An undertaking in attachment, signed by the attachment plaintiff as principal and a firm or partnership as surety, is *prima facie* good. COBB, CH. J., dissents.

2. ———: BOND: SURETIES. Under the provisions of section fourteen, page 73, of the Compiled Statutes, an attorney-at-law should not be allowed by the clerk to become surety upon an attachment undertaking. But if the clerk, in violation of such statute, approves such undertaking, the surety is bound thereby, and the undertaking will be held good upon a motion to discharge an attachment, for the reason that "no undertaking has been filed as required by law."

REHEARING of case reported 16 Neb., 369.

T. D. Cobbey, W. H. Ashby, and J. E. Cobbey, for plaintiff in error.

Hazlett & Bates, for defendant in error.

REESE, J.

A decision was made in this cause at the last term of this court. In the opinion written by Chief Justice Cobb all the questions presented, except one, were passed upon. 16 Neb., 369. S. C. 20 N. W. Rep., 264. The question thus omitted was as to the sufficiency of the attachment undertaking. The undertaking was overlooked, and supposed not to be in the record. Upon a motion for rehearing being filed, the undertaking was found and a rehearing granted upon the one question presented by the motion to discharge the attachment, for the reason that "no undertaking has been filed as required by law." The undertaking was signed by the plaintiff below by his attorneys, and by Colby & Hazlett as sureties, the signatures being in this form:

"V. A. CROWLEY,

"*By Colby & Hazlett, his Att'ys.*

"COLBY & HAZLETT."

The contention by plaintiff in error is that the undertaking is defective for two reasons: *First*. Because the surety is a firm, and not an individual. This objection is

founded principally upon section twenty-six of the civil code, which requires that a company suing in its partnership name shall give security for costs. It is urged that as a firm or company suing in its partnership name must give security for costs before it can maintain an action, therefore such firm or company cannot be sufficient sureties upon attachment bond. We do not think this conclusion necessarily follows. It cannot be claimed that the reason for the law is that companies or partnerships are not responsible, and must for that reason give the security required. The evident purpose of the legislature in adopting the provision was that costs should be readily and speedily collected, without the necessity of any further litigation in order to make a judgment for costs available. An attachment undertaking is for an entirely different purpose—that purpose being to indemnify the attachment defendant against loss or damage growing out of the wrongful suing out of the attachment. If the surety offered is sufficient for this purpose the object of the law is met. We cannot here inquire whether or not the member of the firm signing the partnership name had authority so to do. That question was not presented to the district court. No proofs upon that proposition were offered and no such want of authority was shown. *Second.* Because the undertaking was signed by Colby & Hazlett as sureties, and that they were practicing attorneys. Upon this point plaintiff in error relies upon section 14, chap. 10, of the Compiled Statutes, which provides that “no practicing attorney shall be taken as surety on any official bond or bonds in any legal proceedings in the district in which he may reside.” There is no doubt but that, had the clerk declined to approve the undertaking, he could not have been compelled to do so even though the sureties offered were amply good, financially, and the surety sufficient to fully indemnify the plaintiff in error against loss or damage. But the sureties were offered and were acceptable to the approving officer.

Tessler v. Crowley.

It is conceded by plaintiff in error that an attorney cannot plead his own wrong and thus avoid his liability; that if he signs such an undertaking in the face of the law he is bound thereby, but might be proceeded against for contempt and punished therefor. We admit that the acceptance of such bonds is of very questionable policy; that attorneys should not sign them, nor clerks approve them when thus signed; but we cannot hold that the district court erred in overruling the motion to vacate the attachment because "no undertaking had been filed as required by law." An undertaking had been filed. If the sureties were deemed insufficient, or consisted of persons not competent under the laws, that fact should have been presented by the motion. For aught that is shown by the record the propositions contended for in this court were not mentioned in the court below.

The law is well settled, both in England and this country, that while attorneys are prohibited from signing such undertakings, yet if they do sign them they are bound thereby. The law prohibiting such signing is based upon considerations of sound public policy. An attorney should never allow himself to be placed in the attitude of encouraging litigation. Nor should he allow himself to become personally interested in the cause of his client by assuming any personal liability. When he does become thus interested a strong inducement is offered to seek and take unjust and unfair advantage of the opposite side without reference to the justice of his cause. The law is also for his protection. When interested in behalf of a client whose cause he believes to be just, he is liable, unless restrained by a due and proper respect for the law, to assume liabilities which may become very embarrassing to him. The law very properly admonishes him to avoid such liabilities. *Weeks on Attorneys*, § 119, and cases there cited.

But considerations of public policy again say that if an attorney does sign such obligations he is bound by his

Stuart v. Havens.

contract the same as any other person, and when he procures the approval thereof by the proper officer, he cannot afterward plead his privilege. *Id.* *Wallace v. Scoles*, 6 Ohio, 429.

The district court did not err in overruling the motion to discharge the attachment, and its decision is therefore affirmed.

JUDGMENT AFFIRMED.

MAXWELL, J., concurs.

COBB, CH. J.

I dissent on the proposition first discussed in the opinion. I think the undertaking is void, the surety not being a natural person.

A. P. S. STUART, PLAINTIFF IN ERROR, v. E. N. HAVENS,
DEFENDANT IN ERROR.

17	211
48	737

1. **Negligence: EXCAVATION IN STREET: EVIDENCE.** In an action to recover damages for personal injuries sustained by falling into an excavation in a street made by the defendant, an allegation that he "wrongfully and negligently permitted the same to remain open, uncovered, and unguarded, and without any precautions to prevent accidents by falling into the same" is sufficient to authorize the court to receive evidence tending to show the failure of the defendant to place proper guards and construct a sidewalk around the excavation, and submit the same by proper instructions to the jury.
2. **Action for Injuries to Person: EXAMINATION OF PLAINTIFF.** In an action for personal injuries, where the defendant during the trial asks for an order requiring the plaintiff to submit his person to the personal examination of certain experts selected by the defendant, the application should be denied.
3. ——— : ———. If a personal examination is desired, the application should be made before the trial begins and experts agreed upon by the parties or appointed by the court.

4. **Nuisance: OBSTRUCTION IN STREET BY BUILDER OF ADJACENT LOT.** While temporary obstructions in a street, which are reasonable and necessary for the erection of a building upon an adjacent lot, do not constitute a nuisance if they are not unreasonably prolonged, yet the owner will not be justified in leaving an excavation made by him without proper barriers and safeguards to prevent accidents; nor will the fact that there is a good sidewalk on the opposite side of the street be a defense for such neglect.

• ERROR to the district court for Lancaster county. Tried below before POUND, J.

Sawyer & Snell, for plaintiff in error.

L. C. Burr and *G. M. Lambertson*, for defendant in error.

MAXWELL, J.

The defendant in error brought an action against the plaintiff in the district court of Lancaster county to recover for injuries sustained by him by falling into an excavation made by the plaintiff on P street, in Lincoln, in front of lot 4, block 41, in said city. On the trial of the cause a verdict was returned in favor of the defendant in error for the sum of \$500, upon which judgment was rendered.

The injury is alleged in the petition to have occurred on the 18th day of January, 1884, at which time it is stated that the plaintiff in error was possessed of the lot in question; that "on said day defendant (plaintiff in error) by his agents and employees dug a cellar to the depth of six feet, twenty-five feet in width, and twelve feet in length upon said real estate, and extended the same into the sidewalk of said street, and wrongfully and negligently permitted the same to remain open, uncovered, and unguarded, and without any precautions to prevent accidents by falling into the same, in consequence of which said plaintiff, while passing along said street in the night time, without

any fault on his part, fell into said cellar and was thereby greatly injured," etc. Then follows a statement of the injuries sustained.

The answer admits the ownership of the premises, the digging of the cellar, and alleges "that on the night of January 18, 1884, defendant put up guards and securely protected said cellar and the sidewalk and the approaches thereto so as to prevent passengers who might chance to travel that way or thereby from being injured by falling therein. And that said cellar was so securely guarded on said night that plaintiff could not by any possibility tumble into said cellar without great exertions and a strong determination upon his part to tumble in by tearing down and displacing the guards so set up, etc.

The testimony tends to show that no sufficient fence or guard was placed around the excavation, and that no sidewalk was constructed around the same as required by the city ordinance.

The following instruction was given on behalf of the defendant in error: "The jury are instructed that the ordinances of the city of Lincoln on the 18th day of January, A.D. 1884, required a party digging an excavation into the sidewalk or street of the city of Lincoln to build and maintain and at all times to keep the same unobstructed, a sidewalk of suitable materials, not less than four feet in width, in front of and around said excavation. If the jury find that the defendant failed and neglected to build a sidewalk and maintain a railing such as is provided for and required by said city ordinance, and that on account of the failure and neglect of the defendant in this respect the plaintiff, without fault on his part, fell into said excavation and was hurt and injured thereby, then you will return a verdict for the damages sustained by the plaintiff.

This was excepted to by the plaintiff in error, and the court was asked to give the following: "You are instructed

that damages are not claimed by reason of any defect or want of sidewalk along and in front of said excavation, and that being the case, the want of a sidewalk, if you should find there was not one of suitable material, and you further find plaintiff fell, or claims that he fell, into said excavation at or near the north line of said lot 4 while going east, cuts no figure in the case." It will be observed that the charge of negligence in the petition is that the defendant below "wrongfully and negligently permitted the same (the excavation) to remain open, uncovered, and unguarded, and without any precaution to prevent accidents by falling into the same," etc.

This allegation is broad enough to permit a recovery for any damages sustained by a failure to build a sidewalk. There was no error therefore in the instruction given nor in refusing to give the one asked.

2. The plaintiff below on his direct examination was asked to show his arm, which he claimed was injured by falling into the excavation, to the jury. This he did without objection, and afterwards three physicians, who had treated the arm professionally, testified as to its condition without objection. Afterwards the defendant below asked the court below to make an order requiring Havens to exhibit his arm to four physicians called by him (the defendant). This the court refused to do. This is assigned for error. The question here involved was before this court in *S. C. & P. Ry. Co. v. Finlayson*, 16 Neb., 578, and it was held that where the request was made during the trial and it was sought to have the examination made by experts called by the adverse party, and not by those agreed upon by the parties, or appointed by the court, there was no error in denying the request. We adhere to that decision.

We are aware that the supreme court of Wisconsin in *White v. M. C. Ry. Co.*, 21 N. W. R., 524, seems to have established a different rule; but the one adopted by this court before that decision was made seems more conducive

to justice. Where in a case like this experts are called by a party and permitted to make a personal examination of the person injured, and to testify therefrom, there is danger that they will feel under obligations to the party calling them, and, however honest they may be, color their testimony somewhat in his interest, while in many, if not most, cases their general views upon the question will be known to the party producing them before they are called. In any event the evidence partakes somewhat of a partisan character. To avoid this they should be agreed upon by the parties or appointed by the court, and an examination, if desired, should be made before the trial begins, although the court may permit it to be made during the progress of the trial. The court did not err therefore in overruling the request.

3. The defendant below asked the following instruction, which was refused, to which he excepted: "The jury are instructed that if, under the evidence and law as given you, you find that plaintiff was guilty of contributory negligence in going on the south side of said P street, in front of said excavation, and said contributory negligence operated directly to produce the injury complained of, then and in that case you will find for the defendant." Also the following: "The jury are instructed that if under the evidence you believe that at the time of the alleged injury the plaintiff knew of the existence and condition of the excavation into which he alleges he fell, and if you further believe from the evidence that the sidewalk on the north side of 'P' street, between '11th' and '12th' streets was in a good condition at the time of the alleged injury, and that the plaintiff knew it to be so, and if you find also under the evidence that plaintiff, knowing the above facts at the time of the alleged injury, chose to go on the south side of said 'P' street along in front of said excavation made by defendant, that fact would tend to establish contributory negligence on the part of the plaintiff which the court refused to give."

These instructions in effect say, that if there is a good sidewalk on the opposite side of the street from that on which an excavation is made, a party using the sidewalk must travel on that; otherwise, if in walking around the excavation he falls into it and is injured, he cannot recover.

No cases are cited to sustain these propositions, and I think none can be found. Temporary obstructions in a street which are reasonable and necessary for the erection of a building upon an adjacent lot do not constitute a nuisance provided they are not unreasonably prolonged. But such obstructions are justified only so long as they are reasonably necessary, and will not justify the owner of the lot in leaving an excavation in the street in an unsafe condition. The court, therefore, properly refused to give the instructions in question. The fifth and sixth assignments of error relate to admission and rejection of evidence, and, as no errors appear, need not be considered. The judgment is fully supported by the evidence, and there is no error in the record. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	216
17	331
17	216
44	411

STATE OF NEBRASKA, EX REL. JAMES E. PHILPOTT, v.
ERNEST HUNGER.

Execution: SEVERAL WRITS. When two or more writs of executions against the same debtor are delivered to an officer on the same day, no preference can be given to either; if a sufficient sum of money be not made to satisfy all the executions, the amount shall be distributed to the several creditors in proportion to the amount of their respective demands. This rule applies to executions issued by justices of the peace.

ORIGINAL application for mandamus.

James Philpott, pro se, (Lamb, Ricketts & Wilson with him).

A. C. Platt and Harwood, Ames & Kelly, for respondent.

MAXWELL, J.

The respondent is a constable in the city of Lincoln. On the 5th of January, 1885, twenty-four executions upon separate judgments recovered before certain justices of the peace of said city against Frank L. Wilson and Thomas Dobbins were issued and placed in his hands. The aggregate amount of these executions was the sum of \$2,213.48. The respondent levied the executions upon the personal property of Wilson and Dobbins and sold the same, the amount realized from said sale, after deducting the expenses, was the sum of \$1,365.60. This sum the respondent was about to apply *pro rata* upon the several executions above referred to, when the relator brought this action, claiming that, as his execution was the fifth in the order in which the several executions were delivered to the respondent, and while there were sufficient funds in his hands to satisfy the same in full, therefore he is entitled to be paid the entire sum due upon his execution, and not a part thereof. The question presented is the authority of the officer to apply the proceeds of the sale *pro rata* upon the executions.

Sec. 484 of the code provides that * * "when two or more writs of execution against the same debtor shall be delivered to the officer on the same day, no preference shall be given to either of said writs; but if a sufficient sum of money be not made to satisfy all executions, the amount made shall be distributed to the several creditors in proportion to their respective demands. In all other cases the writ of execution first delivered to the officer shall be first satisfied.

Sec. 1085 provides that "the provisions of this code which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace."

The provisions of section 484 seem to be applicable to executions issued by a justice of the peace. And that is the construction placed upon the sections in question by Judge Swan in his valuable Treatise on the Powers and Duties of Justices of the Peace (10 Ed.), 290. See also Maxwell's Practice in Justices' Courts (4 Ed.), 102.

That justice is best subserved in cases of insolvency by an equitable distribution of the proceeds of the sale of the debtor's property among his several creditors must be conceded, and the sections of the code under consideration evidently were designed to accomplish, in a degree at least, that purpose.

The rule as here stated was applied by the supreme court of Ohio in *Wilcox v. May*, 19 Ohio, 408, where separate executions were issued out of a court of record, within ten days from the close of the term at which the judgments were rendered, and were levied upon lands in another county, the judgments not being liens on said lands.

We think the respondent should apply the money in his hands *pro rata* on all the executions against Wilson and Dobbins received by him on the 5th day of January, 1885. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

STATE, EX REL. MYRON H. SOUTHWICK, v. ELIAS C.
WILCOX.

Liquors: LICENSE MONEY BELONGS TO SCHOOL FUND. The city of W. required an applicant for license to sell intoxicating liquors to pay to the city treasurer \$1,000, one-half of which sum to be paid to the school district in which W. is situated, and the other to be retained by the city as an occupation tax on saloon keepers. *Held*, That as the entire sum of \$1,000 was required to be paid as a condition of obtaining a license, it was license money and not a tax, and, under the provisions of section 5, Art. VIII., of the constitution, belonged to the school district.

17	819
19	808
17	219
28	257
29	291
17	219
47	890
17	219
51	877
17	219
61	494

ORIGINAL application for mandamus.

The ordinance under which respondent claimed the license money is as follows:

"ORDINANCE No. 2.

"An ordinance to license and regulate, and to prohibit without license, the sale of malt, spirituous, and vinous liquors in the city of Wymore, Gage county, Nebraska, and to punish the sale of intoxicating liquor without license, or to minors, insane persons, habitual drunkards, and Indians, and after certain hours and on certain days, and to provide for an occupation tax on saloon keepers.

"Be it ordained by the Mayor and Council of the City of Wymore, Nebraska:

"SECTION 1. It is hereby made unlawful for any person or persons, individuals or firms, by himself, themselves, his or their agents, clerks, or servants, to sell or give away on any pretext, or to keep for sale, any malt, spirituous, or vinous liquors, or any intoxicating drinks within the corporate limits of the city of Wymore, Gage county, Nebraska, without having first complied with all the provisions of this ordinance and obtained a license as herein set forth.

"SEC. 2. Any person desirous of obtaining a license under this ordinance shall proceed as follows: 1st. He shall at his own cost and expense publish a notice once each week for two weeks in a newspaper of general circulation published in said city of his intention to make application for said license. 2d. He shall present said notice with the sworn certificate of the publisher of said newspaper that the same has been published as required by this ordinance to the mayor and council of said city at a meeting thereof, with a petition signed by not less than thirty resident freeholders of the ward in which said liquor is to be sold, setting forth that the applicant is a man, or men, of respectable character and standing and a resident, or residents, of the city, and praying that a license may be granted to him or them. 3d. He or they shall also present to said council a bond in the penal sum of five thousand dollars, payable to the state of Nebraska, with at least two good and sufficient sureties, resident freeholders of the county, conditioned that he or they will not violate any of the provisions of this ordinance, or any law of the state on the subject of liquors, and that he or they will pay all fines, damages, penalties, and forfeitures which may be adjudged against him or them under the provisions of this ordinance or under chapter fifty (50) of the Compiled Statutes of the State of Nebraska, entitled "Liquors." 4th. He or they shall also pay to the treasurer of said city a license fee for the use of the school fund of said city of five hundred dollars and a further sum as an occupation tax for the use of said city of five hundred dollars if said license is to be issued for a full municipal year, or a proportionate sum if for a less time, and produce the treasurer's receipt for said amounts; *Provided*, That no such license shall be granted for a shorter period than the time intervening between the time of issuing said license and the end of the municipal year if said time is less than six months, but if said intervening time is greater than six

months, then said license shall not be granted for less than six months, and the city treasurer of said city shall on the receipt of any money paid for a license under this ordinance place one-half thereof to the credit of the school district of Wymore, subject to the order of the school treasurer of said district, and shall place the other half of said money to the credit of the general fund of said city, and pay the same out upon the outstanding warrants of said city in the order in which the same have been registered for payment.

"SEC. 3. The end of the municipal year for the purposes of this ordinance shall be the first Tuesday after the annual municipal election in said city in each year, and all licenses shall expire on that date.

"SEC. 4. When the applicant has fully complied with the provisions of this ordinance, and paid the license fee and occupation tax mentioned in section 2 hereof, and the mayor and council have satisfied themselves that all of said requirements have been complied with and that the applicants are men of respectable character and standing, and having satisfied themselves that the sureties on the bond are good and sufficient, and there being no protest or remonstrance in writing filed, said license may be granted.

"SEC. 5. In all cases when protests or remonstrances have been filed the hearing thereof shall be proceeded with as provided in chapter (50) fifty of the Compiled Statutes of Nebraska, entitled "Liquors."

"SEC. 6. The license shall be issued by the clerk of the city, signed by him, and attested by the signature of the mayor and the seal of the city.

"SEC. 7. All saloons licensed under this ordinance shall be closed promptly at eleven o'clock P.M., and shall not open before five o'clock A.M., and it shall be unlawful for any person holding such license to keep their saloon open on Sunday, or on the day of any general or special election, or to sell any intoxicating drinks to any minor, Indian, insane person, or habitual drunkard.

"SEC. 8. Said license may be revoked by the mayor and council and the money paid therefor forfeited at any time that said mayor and council are satisfied on due proof that the party holding said license is keeping a disorderly house or has violated any of the provisions of this ordinance or any law of this state relating to intoxicating liquors or gambling:

"SEC. 9. Permits will be issued to druggists for the sale of liquor for medicinal, mechanical, and chemical purposes, upon their compliance with all the requirements of this ordinance, except that no license fee or occupation tax shall be charged except the cost of issuing said permit.

"SEC. 10. Any person who shall sell or give away any intoxicating liquors without having complied with the provisions of this ordinance and obtained a license as herein provided, or any person holding such license who shall sell or give away any intoxicating liquors to any minor, habitual drunkard, insane person, or Indian, or shall keep their saloon open after eleven (11) o'clock P.M., or open the same before five o'clock in the morning, or any person, whether holding such license or not, who shall violate any of the provisions of this ordinance shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than ten dollars (\$10.00) nor more than one hundred (\$100.00) dollars and costs, or be imprisoned not exceeding thirty days, and in case a fine is imposed shall stand committed to the common jail of the county or the city jail of the city of Wymore until said fine and all costs made in said action shall be fully paid.

"SEC. 11. All ordinances of the city of Wymore on this subject are hereby repealed, and this ordinance to take effect immediately on its passage and publication as required by law.

"Approved this 30th day of September, 1884.

"D. McGUIRE,

"Mayor."

"STATE OF NEBRASKA, }
"GAGE COUNTY, } ss.

"I do hereby certify that the foregoing ordinance was passed by the mayor and city council of Wymore, Nebraska, at a meeting held by them at 8 o'clock P.M. on the 30th day of September, 1884.

"[SEAL.]

T. D. COBBEY,
"City Clerk."

Burke & Prout, for relator.

A. D. McCandless, for respondent.

MAXWELL, J.

The relator is treasurer of school district No. 114, of Gage county, and the respondent is treasurer of the city of Wymore, which is embraced within the limits of school district No. 114. This is an application for a mandamus to compel the respondent to pay to the relator as treasurer of said school district "all fines, penalties, and license moneys paid into his hands by virtue of the rules, by-laws, or ordinances of said city."

The respondent in his answer states "that the sum of money, to-wit, six hundred and seventy-six dollars and thirty cents, now held by him and claimed by the relator, was not realized or collected from any fine, penalty, or license money, and does not belong to the school fund of said district, but was collected as an occupation tax under Ordinance No. 2 of said city."

There is a stipulation in the record "that the money described in relator's application or petition was collected by respondent, as alleged by him in the second count of his answer, as a license tax upon the occupation of saloon keepers or dealers in intoxicating liquors under and by virtue of the ordinance of the city of Wymore, attached to respondent's answer;" that is, the authorities of the city of Wymore

fixed the sum to be paid for a license at \$1,000, but provided that one-half of this sum should be paid to the school district and one-half into the city treasury.

The question presented is the authority to divert one-half of the money thus received into the city treasury. It will be observed that the entire sum of \$1,000 is required to be paid by the applicant for license to enable him to obtain the same. No part of this sum is obtained as a tax, but as a condition of obtaining the license. The \$1,000 is paid as a whole for the license—not a part for license and a part as tax, because without the payment of the entire sum the license would not be issued. We must hold, therefore, that the money in question is derived from licenses and not as taxes, and, under the provisions of section 5, Art. VIII., of the constitution, belongs to the school district and not to the city. Other questions are discussed in the defendant's brief, but as they are not raised by the record they need not be considered. A writ of mandamus will issue as prayed.

WRIT ALLOWED.

THE other judges concur.

ISAAC WHITMAN, PLAINTIFF IN ERROR, v. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Indictment.** In charging the commission of an offense in an indictment, it is not necessary that the exact words of the statute be used, provided the words employed are the equivalents in meaning of those contained in the statute.
2. —: **CHARGING SHOOTING WITH INTENT TO KILL.** In an indictment under section 16 of the code for shooting with intent to kill the word "maliciously" was omitted, but it was alleged that the act was "unlawfully, willfully, purposely, and feloniously" done. *Held*, That these words included the full signification of the word "maliciously," and that verdict would not be set aside in the indictment quashed as not stating an offense.

17	224
20	268
17	224
36	161
17	224
43	5
17	224
53	328
53	439
17	224
60	629

ERROR to the district court for Saunders county. Tried below before POST, J.

S. H. Sornberger and *N. H. Bell*, for plaintiff in error.

William Leese, Attorney General (*William Marshall* with him), for the state.

MAXWELL, J.

The plaintiff was indicted for shooting one William S. Wilson with intent to kill him, and was convicted and sentenced to imprisonment in the penitentiary for three years. He now claims that the indictment fails to charge an offense by reason of the omission of the word "maliciously."

Section 16 of the criminal code under which the plaintiff was convicted is as follows: "If any person shall maliciously shoot, stab, cut, or shoot at any other person with intent to kill, wound, or maim such person, every person so offending shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

The first count of the indictment under which the plaintiff was convicted is as follows: "At the May term of the district court, of the fourth judicial district of the state of Nebraska, within and for Saunders county in said state, in the year of our Lord one thousand eight hundred and eighty-four, the grand jurors chosen, selected, and sworn in and for the county of Saunders, in the name and by the authority of the state of Nebraska, upon their oaths present, that Isaac Whitman, late of the county aforesaid, on the fourteenth day of December, in the year of our Lord one thousand eight hundred and eighty-three, in the county of Saunders and state of Nebraska aforesaid, with a certain pistol, commonly called a revolver, then and there loaded with gunpowder and one leaden ball, which said

pistol he, the said Isaac Whitman, in his right hand then and there had and held, one William S. Wilson did unlawfully, willfully, purposely, and feloniously shoot with intent then and there and thereby him, the said William S. Wilson, to kill, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska."

The plaintiff's attorneys concede that it is not necessary that the exact language of the statute be used in every instance, provided the words employed are the equivalents in meaning of those contained in the statute. 1 Bish. Cr. Pro., § 612. The words used, however, must include the full significations of the statutory words. 1 Bish. Cr. Pro., § 612. *Tully v. People*, 67 N. Y., 15. *State v. Robbins*, 66 Me., 324. *State v. Drake*, 64 N. C., 589. *State v. Boyle*, 28 Iowa, 522. *Com. v. Parker*, 117 Mass., 112. *Jones v. State*, 51 Miss., 718. *State v. Ware*, 62 Mo., 597. *Rex v. Ellsworth*, 2 East P. C., 986. *Robertson v. State*, 31 Tex., 86. *Francis v. State*, 21 Id., 280. *State v. Bullock* 13 Ala., 418. *Buckley v. State*, 2 Greene, 162. *People v. Thompson*, 4 Cal., 238.

The question for determination is, whether or not the words "unlawfully, willfully, purposely, and feloniously" include in the meaning the full signification of the word "maliciously."

Bouvier defines malice to be "The doing a wrongful act intentionally, without just cause or excuse." 2 Law Dict. (14th Ed.), 91. Webster gives the law definition as follows: "With wicked or mischievous intentions or motives;" and the word "maliciously" as meaning "in a malicious manner; with malice, enmity, or ill will." He defines felonious as follows: "Having the quality of felony; malignant, malicious, villainous, traitorous, perfidious; indicating or proceeding from a depraved heart or evil purpose, as felonious homicide, felonious thief." The meaning of "purposely" as given by Webster is "by purpose or

design; intentionally; with premeditation;" and the same authority defines "unlawfully" as "in an unlawful manner; in violation of law and right; illegally." "Willfully" he defines as follows: "In a willful manner; obstinately; stubbornly; by design; with set purpose." It will be seen that the words employed in the indictment include the full signification of the word "maliciously," and are more than equivalents in meaning of the words of the statute, as when the statute declared it a felony to make fraudulently any coin in "imitation" of the current coin, etc. An indictment which charged the defendant with fraudulently making coin of the "likeness" and "similitude" of the current coin was held sufficient. *Peek v. State*, 2 Hump., 78. *State v. Brill*, 2 Brev., 262. *Skains v. State*, 21 Ala., 218. Bish. Cr. Pro., § 612. The better course is to use the language of the statute in charging an offense in an indictment so that the necessary facts constituting the charge may be precisely set forth, but when the words used include the offense charged, the verdict will not be set aside upon the ground that the indictment fails to charge an offense. In the case under consideration there is certainly sufficient set forth to charge that the shooting with intent to kill was done maliciously. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	228
26	710
17	228
35	591
35	651
17	228
38	147
17	228
41	681
17	228
44	147
17	228
45	296
17	228
47	793
17	228
51	188
17	228
59	604

THOMAS ENYEART, PLAINTIFF IN ERROR, V. JAMES A.
DAVIS, DEFENDANT IN ERROR.

1. **Landlord and Tenant: SURRENDERING LEASE.** Where a lessee was in possession of a farm under a lease from the owner for a term of five years, which lease gave the lessee an option to buy the farm at any time during the term, at a specified price, and within the second year of the term he received and accepted a new lease from the owner for a term of two years, which second lease contained a clause that the lessee would, at the end of said term, quietly and peaceably yield up possession of the said premises unto the lessor in as good condition as the same were when entered upon, ordinary wear or damage by fire excepted, *Held*, A surrender of the former lease by operation of law.
2. **Trial: EVIDENCE.** The question of the admissibility of evidence on the ground of relevancy cannot be raised in a cause tried to a court without a jury.

ERROR to the district court for Washington county.
Tried below before WAKELEY, J.

Davis & Powers and *W. J. Connell*, for plaintiff in error.

Ballard & Walton and *John D. Howe*, for defendant in error.

COBB, CH. J.

This is an action in the nature of an action of ejectment, brought by the defendant in error against the plaintiff in error to recover a certain tract of land. The petition is in the usual form in such case. The plaintiff in error, as defendant, filed an answer in the nature of a cross-bill, denying the title and right of possession of the plaintiff, and alleging that he, the said defendant, was in the possession of the said land by virtue of a certain written contract and lease of said land executed to him by one H. E. Wells,

Enyeart v. Davis.

who was then the owner of said land, for the term of five years, from and after the first day of January, 1881, at a rental of one hundred dollars per annum; and which said contract and agreement contained the further provision that if at any time during said five years the said defendant should see fit to purchase said premises, he should have the right to do so, at the agreed price of twelve hundred dollars, as follows: three hundred dollars cash, and the remainder in notes, secured by mortgage on said land, with interest at the rate then obtained by said Wells on other mortgage loans; that said defendant was, and had been, in the possession of said land ever since March first, 1881, cultivating the same and living thereon with his family, and making valuable and permanent improvements thereon with a view and intention and for the purpose of making purchase of said farm under and in pursuance of said contract and agreement, and during all of said time making payment of the rent and taxes, as specified in said agreement or as required by the said Wells; that the provision of said contract, so far as the agreement of the said Wells to sell said farm to plaintiff at any time during said term of five years is concerned, the same remains in full force and effect, and has never been changed, modified, or revoked; that, relying on said contract for the sale of said land to him by said Wells, and with a view and intention of purchasing said farm, he made certain valuable improvements thereon (which are therein enumerated), which was done with the knowledge and approval of the said Wells, and at a cost to said defendant of eight hundred dollars; that during all the time that defendant had occupied the said farm the plaintiff has been a near neighbor of defendant, living within one-half mile of said farm, and a frequent visitor thereon, and that at several times during the occupation of said farm by said defendant the said plaintiff was fully informed and well knew of the terms of said contract with said Wells, and that at the time of pretending to purchase

said farm from said Wells the plaintiff had actual notice and full knowledge of the rights of said defendant in the premises, and well knew that said defendant was intending to buy said farm within the time fixed by said contract; that on or about the 22d day of March, 1883, he, the said defendant, made a tender to the said Wells of three hundred dollars, lawful money of the United States, and also, on the — day of April, 1883, he made a like tender to said plaintiff, and also proposed and offered to both said Wells and plaintiff to make and execute the proper note and mortgage to secure any balance due from said defendant necessary to cover the purchase price of said farm, and duly demanded from said Wells and from said plaintiff a deed of said land, which tender and offer defendant renewed and kept good, and that the said Wells and the said plaintiff both refused said tender, and declined to accept or consider the said offer, and absolutely and unconditionally refused to make to said defendant a deed for said farm.

Defendant further alleged that while he was occupying said farm, to-wit, on or about the 5th day of September, 1881, at the special instance and request of said Wells, he received upon said farm 240 head of sheep belonging to said Wells, to feed and care for said sheep, the said Wells agreeing that for such care, feed, etc., said defendant should receive the full and fair value of said feed, expenses, and care, which defendant gave and bestowed until March 17, 1882, the items of which said feed, care, and expense which said Wells agreed to pay, and which defendant alleges are fair and reasonable as charged, are contained in Exhibit B, attached to and made a part of said answer. And defendant further alleged that for the purpose of properly housing the said sheep it became and was necessary to build a certain barn on said farm, which, accordingly, was erected, it being agreed and understood that upon final adjustment of all matters in difference between defendant and said Wells that said Wells be allowed and credited with

Enyeart v. Davis.

the sum of six hundred dollars, the agreed price of said barn, in addition to twelve hundred dollars, the agreed price for said land.

The said defendant therefore prayed that an accounting might be had of the balance due from him in the premises, and that upon the payment of three hundred dollars cash, and executing a mortgage for the remainder, that said plaintiff and said Wells be required to convey to defendant the said land, and the improvements thereon, which said defendant prayed might be adjudged as held in trust for him, the said defendant, and for general relief.

The plaintiff filed a reply to the said answer and cross-bill of the defendant, in which he denied the several allegations therein, except as in the said reply are specifically admitted, and such as were substantially set out in the petition. He admitted that the said Wells leased said premises to the defendant for the term of years as set out in the defendant's answer, but he denied that said Wells ever agreed to sell the same to defendant as set forth in his said answer, and denied that the said Wells ever agreed to pay defendant for taking care of said sheep, or furnishing food for the same, and denies that he is indebted to said defendant therefor, and plaintiff alleged the truth to be that some time in the month of September, 1881, the defendant and one Edwin Brooks entered into a contract in substance that the defendant should take the sheep, named in defendant's answer, and keep the same five years without any expense to said Brooks, and annually the said defendant should return to the said Brooks one-half of the wool and one-half of the increase, and the original number of sheep at the end of five years, and the said defendant was to have one-half of the wool and increase thereof in full for his pay for the care and feed of said sheep. That the said defendant so negligently and carelessly cared for said sheep that they nearly all died, and by reason thereof the said defendant and the said Brooks annulled said contract,

and said Brooks took away the balance then living—about fourteen head; that said Wells never, directly or indirectly, entered into any contract concerning the care of any sheep or the feed thereof, and never furnished the defendant any sheep, but after September, 1881, the said Wells bought a one-half interest in said sheep then held by said defendant. And the plaintiff in his said reply further alleged that some time in the month of March, 1882, the defendant and the said Wells had a final settlement of all matters between them up to that date, and the said Wells, in consideration of an amount due to said defendant from said Wells and said final settlement, and the defendant entered into a written lease of said premises to the defendant from said Wells from the month of March, 1881, to the month of March, 1883, and in said lease the said defendant agreed to yield up to said A. E. Wells, or his assigns, the possession of said premises on the first day of March, 1883, and therefore the former lease and contract between them, and all contracts in relation to the said premises, were then and there canceled and annulled, etc.

There was a trial to the court, and a finding for the plaintiff. And a motion for a new trial having been overruled, and a judgment rendered for the plaintiff, the defendant brings the cause to this court on error.

The plaintiff in error presents the following points in his petition in error:

“I. For the reason that the finding of said court or verdict is not sustained by the evidence in the cause.

“II. That the verdict is contrary to law.

“III. Error of the court in refusing to submit the questions of fact in said cause to a jury as requested by the defendant on the trial of said cause.

“IV. Error of the court in the admission of evidence introduced by the plaintiff over the objection of the defendant at the time, and excepted to by the defendant.

“V. Error of the court in dismissing defendant's

cross-bill for specific performance of a contract set up in defendant's answer.

"VI. Error of law by the court during the progress of the trial of said cause in the admission of evidence objected to by the defendant and excepted to at the time."

The first, second and fifth errors assigned will be considered together.

It appears from the evidence as preserved in the bill of exceptions that shortly before the 8th day of January, 1881, the defendant had, upon the invitation of A. E. Wells, met him at Tekama, and driven to the farm in question, then lately purchased by Wells, and examined it with a view of leasing it for a term of years, and ultimately purchasing it from Wells. The contract then entered into between them for that purpose is evidenced by a letter written by Wells to defendant on the 8th day of January, 1881, and sent by mail to defendant, of which the following is a copy:

"OAKLAND, NEB.,

"Jan. 8, 1880 (*sic*)."

"J. L. Enyeart:

"DEAR SIR—I have agreed to rent you my farm near Herman, in Washington county, Neb., being the south half of the N. E. $\frac{1}{4}$ and the south half of the N. W. $\frac{1}{4}$ of sec. No. 26, in township No. 21 north, range 10 east, for the term of five years, from and after the Jan. 1, 1881, at an annual cash rent of one hundred dollars (\$100), payable at the end of each year. You to pay taxes during said term, commencing with the taxes of 1881 and including the taxes of 1885. You to keep up and maintain all improvements and repairs. I also agree to sell said farm to you at any time during said term for the sum of twelve hundred dollars (\$1,200), and upon payment of three hundred dollars in cash will give you a deed and take a mortgage for the balance, with the rate of interest then obtained by me on other mortgage loans.

"A. E. WELLS.

"Witness:"

Defendant took possession of said farm under the said contract, and moved on to it, with his family, on the 9th day of March, 1881. He paid the taxes for 1882 and settled with Wells for those for 1881, in the settlement hereinafter referred to. He also made improvements on the farm, consisting of setting out shade and fruit trees, small fruits, and vines, driving a well, putting in a pump; tubing and curbing, putting lightning rod on barn, insuring barn, grading in and about barn, filling gulch and sink holes on farm, feed lot, fence posts, and hen house, which defendant, when on the stand as a witness in his own behalf, estimated to be worth in the aggregate fifteen hundred and eighty-seven dollars.

There was a vast amount of conflicting testimony in regard to a band of sheep which were kept on the said farm by the defendant, which, according to testimony, belonged to the said Wells, and that defendant kept them for hire, but as I do not see that the same could properly enter into the consideration of the issue between the parties, and in view of the conflicting testimony it must be presumed that the trial court found against the defendant in that behalf—which it was amply warranted in doing, no further reference will be made to that matter.

It appears from the evidence that while the defendant was in the possession of the farm under the said contract the said A. E. Wells built a barn thereon, to which building the said defendant contributed a considerable amount in material furnished, money paid workmen, work, hauling material, and boarding the workmen engaged in its erection.

The defendant and Wells met at the house of the former on the farm in question on the 25th day of March, 1882, and, after remaining part of the day there and looking over papers and accounts, and discussing business matters, they, together with a Mr. Cull, who was a witness at the trial, went to the office of Mr. Darrell, in the village of Herman,

where the business was renewed and completed. While the parties were together on this day, at the house of defendant, or at the office of Mr. Darrell, or partly at one place and partly at the other, there was a settlement made between them, which resulted in the execution, delivery, and receipt of a second lease of the said farm from Wells, to defendant. This lease will be referred to hereafter. But as counsel on either side seem to lay considerable stress on the said settlement, I will observe that while the testimony is altogether conflicting as to whether the said settlement was confined to the claim of defendant for the matters and things growing out of the erection of the barn, or embraced also his claims for improvements put upon said farm (excepting the pump), yet, in the view that I take of the matter, it makes little or no difference which version is true. It is true there is not much doubt as to what A. E. Wells contributed to this settlement two years' rent of the farm at one hundred dollars per year and the taxes for the year 1881. The admitted account of the defendant for matters growing out of the erection of the barn amounted to two hundred and twenty-eight dollars and eighty-three cents. Taxes must be pretty high up there, if the account of Mr. Wells, after balancing defendant's admitted barn account, had much left to apply on the improvements, and the value of his unexpired lease, and option to purchase the farm.

But however this may be, the fact is undisputed that upon the conclusion of this settlement the defendant, signed, delivered, and received, to and from said Wells, a lease *inter parties*, whereby his tenancy was restricted to two years, and wherein he agreed to deliver up the possession of said farm to the said Wells, or his assigns, at the end of such term.

The defendant in his testimony says that he did not know at the time he received and accepted the said last mentioned lease that it contained the clause for the redelivery of the possession of the premises at the termination

of the new term. But he nowhere claims that he did not knowingly and intentionally accept of the new lease or the new term.

The law is thus laid down by a standard authority: "Where a lessee for years accepts a new lease from the reversioner, he is estopped from saying that his lessor had no power to make such a lease; and as the lessor cannot grant a new lease until the prior one has been surrendered, the acceptance of the new lease necessarily implies a surrender of the former one. Such surrender is an act of law and takes place independently of the intention of the parties." Taylor's Landlord and Tenant, § 507, citing *Challoner v. Davies*, 1 Ld. Ray, 402. *Livingston v. Potts*, 16 Johns., 28. *Bailey v. Delaplaine*, 1 Sanf., 5. *Jungerman v. Bovee*, 19 Cal., 354. See also *Van Rensselaer's Heirs v. Penniman*, 6 Wend., 569. *Springstein v. Schermerhorn*, 12 Johns. R., 357, and Roberts' on the Statutes of Lands, 254 *et seq.*

So, although it were proved or admitted that the clause in the new lease providing for the redelivery of the premises to the lessor at the end of the term was fraudulently inserted, I do not see that it would benefit the defendant, for, as we have seen, the same consequence would flow from the acceptance of the new lease whether it contained that clause or not.

The claim of the defendant to a specific performance is based solely upon the terms of the first or original lease. This, we have seen, was surrendered by operation of law, therefore no right depending upon it is capable of enforcement.

The second error assigned cannot avail the plaintiff in error, because it is stated, both in the record proper and in the bill of exceptions, that the cause was tried to the court without the intervention of a jury by stipulation of parties.

The fourth and sixth errors assigned are identical. "Error of the court in the admission of evidence intro-

duced by the plaintiff over the objection of the defendant at the time and excepted to by the defendant."

Greenleaf states the law that "In trials of fact without the aid of a jury the question of the admissibility of evidence, strictly speaking, can seldom be raised; since whatever be the ground of objection the evidence objected to must, of necessity, be read or heard by the judge in order to determine its character and value." 1 Greenleaf on Ev., § 49. There can be no doubt of the correctness of this rule when confined to questions of relevancy, and as my attention has been called only to this class of objections in the record it is not deemed necessary to examine the question further.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

WILLIAM N. HAYWOOD, APPELLANT, v. HELEN D.
THOMAS ET AL., APPELLEES.

1. **Adverse Possession.** A party in the actual, open, notorious, exclusive, adverse possession of real estate for ten years thereby acquires the absolute right to the exclusive possession of the same. *Gatting v. Lane*, ante p. 80.
2. ———: **COLOR OF TITLE** is not necessary to such right except where it is sought to extend the same beyond the limits actually held *possessio pedes*.
3. ———. Such possession and right carry with them the *title* to the real property.

APPEAL from Burt county. Heard below before
WAKELEY, J.

17	237
18	625
18	637
21	232
21	683
17	237
26	641
17	237
33	570
33	868
17	237
31	809
17	237
38	854
17	237
48	519
17	237
50	517
17	237
60	97

N. J. Sheckell, for appellant.

Hopewell & Dickinson, for appellees.

COBB, CH. J.

This action was brought in the district court of Burt county by the plaintiff, who is also appellant, to set aside certain tax deeds under which he alleged the defendants held possession of certain lots in the town of Tekamah, and which tax deeds the plaintiff alleged to be null and void for the reasons therein stated.

Plaintiff in his petition alleged himself to be the owner of said lots; that he had tendered to the defendants on the 5th day of March, 1884, the amount of all taxes paid by them on the said lots, with interest thereon from the time of the same having become delinquent, which they refused, and which tender he renewed and kept good, with prayer that said tax deed might be adjudged to be void and removed as a cloud upon his title to said land.

The defendants by their answer admitted all of the facts stated by the plaintiff in his petition, except that they denied that plaintiff was the owner of the said lots, and denied that in making sale of said lots for delinquent taxes the county treasurer of Burt county acted without authority of law as alleged in said petition. The defendants in and by their said answer alleged that they are the only heirs-at-law as well as the only legatees under the will of George P. Thomas, deceased. That about the year 18—the said George P. Thomas took actual possession of the premises in controversy, and enclosed the same, together with other lands, by a substantial fence, and was for more than ten years thereafter in actual, undisputed, continuous, and notorious possession of the same.

Defendants also alleged that from and after the issuance and delivery of the tax deed to the said George P. Thomas,

Haywood v. Thomas.

as in plaintiff's petition alleged, the said George P. Thomas was in actual, continuous, undisputed, and notorious possession of said premises during his lifetime; that the defendants succeeded to and have since continued in such possession, and that such possession had been for more than ten years prior to the commencement of the said suit. Also that as legatees under the will, as set forth in plaintiff's petition, they succeeded to and became seized and possessed of whatever right, title, or claim to said premises belonged to the said George P. Thomas at the time of his death.

The cause was tried to the court, which found that at the commencement of the suit the title to the premises in controversy was in the defendants, with a judgment dismissing the suit and in favor of the defendants for costs.

A motion for a new trial having been overruled, the plaintiff brings the cause to this court on appeal.

There is no assignment of errors, so the only questions presented by the record are, whether the finding of the court is sustained by sufficient evidence, and whether the judgment thereon is in accordance to law.

There is but little conflict of testimony, and doubtless the great weight of evidence is to the effect that in the year 1868 or 1869 that portion of the town of Tekamah in which the lots in question are situated, though previously laid out in blocks, lots, and streets, was entirely unoccupied, unimproved, and uncultivated; that in one of said years George P. Thomas entered upon the same, claiming it as owner, and erected a post and board fence thereon, which, together with a string of fence on the west side thereof, previously erected by O. Harrington, and to which George P. Thomas connected the west end of the south string of his fence, so erected, and a stream of water forming the northerly limit of said portion of said town, and to which the east string of said Thomas' fence was extended and connected, completely enclosed the lots in question, together

with other lots and blocks and parts of streets; that the land so enclosed, including the lots in controversy, was used as a pasture for stock by the said Thomas and his tenants up to and including a portion of the year 1879; that some time in the year 1870 the said string of fence belonging to O. Harrington was partly destroyed by fire, and that in the spring of 1871 said Thomas built a fence east of and parallel to it, so as to restore his said enclosure.

I think the evidence satisfactorily proves that the fence enclosing the lots in controversy was kept up and maintained for the full period of ten years. The witness, John Thomas, who, from his own testimony and that of other witnesses, was one of the hands who were engaged in building it, testified that it was completed between the middle of April and the middle of May, 1869. The witness, Samuel Maveen, also one of the workmen who built the fence, testified that it was built in the spring of 1869. The witness, John Thomas, being recalled, testified that the fence was still kept up and the enclosure used as a pasture for stock during the whole of the pasturing season of 1879. A. Nelson, a witness for defendants, who seemed to be well acquainted with the premises, was of the opinion, to the best of his recollection, that the premises continued to be enclosed by the said fence as late as 1880.

There is doubtless some conflict of testimony as to the time when the said fence was removed, but, as before stated, the weight of the evidence warrants the conclusion that it was kept up for full ten years. And certainly, the trial court having found the facts in favor of the defendants, there is sufficient evidence to sustain its finding.

That the defendants are the devisees under the will of George P. Thomas, deceased, and entitled to all of his rights in the premises, is conceded in the pleadings. In the opinion of this court denying a rehearing in the case of *Galling v. Lane*, ante, p. 80, the law is thus stated:

"1. A party in the actual, open, notorious, exclusive, ad-

Warren v. Dick.

verse possession of real estate for ten years thereby acquires the absolute right to the exclusive possession of the same.

"2. *Color of title* is not essential to adverse possession, but when a party does not enter under color of title, his possession is limited to the premises actually occupied by him."

I am entirely satisfied with that opinion, adopt it as applicable to this case, and refer to the authorities therein cited.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

MARY M. WARREN AND CHARLES WARREN, PLAINTIFFS IN ERROR, v. JAMES A. DICK, DEFENDANT IN ERROR.

1. **Attachment: SERVICE BY PUBLICATION: SALE: DEFENDANT OPENING JUDGMENT.** Where an attachment proceeding is instituted against a non-resident by filing a proper affidavit causing an order of attachment to be issued and levied upon his property, and service is had by publication, a judgment being rendered and the attached property sold to a good faith purchaser, the appearance by the defendant within five years, filing an answer to the merits, and procuring the judgment to be opened under the provisions of section 82 of the civil code, is a general appearance and waives all irregularities and defects in the service by publication, and gives the court jurisdiction over the whole case, if it did not before exist, and no question can afterwards be raised as to the jurisdiction of the court over the person of the defendant.
2. **Attachment: SERVICE BY PUBLICATION HELD GOOD.** Notice of the pendency of the action examined and held to be a compliance with the requirements of the statute authorizing service by publication.

17	241
28	400
17	241
34	650
17	241
43	236
17	241
47	802
17	241
50	345
17	241
60	681
60	715

3. **Judicial Sale: RIGHTS OF PURCHASER.** A purchaser, in good faith, of real estate sold under an order of sale issued in such attachment proceedings will be held to have acquired the title of the judgment debtor even though the judgment may be opened and the defendant permitted to make his defense under the provisions of section 82 of the civil code.

ERROR to the district court for Cass county. Tried below before POUND, J.

Sam. M. Chapman and James S. Matthews, for plaintiffs in error.

M. A. Hartigan, for defendant in error.

REESE, J.

This was an action in ejectment instituted in the court below for the possession of lot number twelve, in block number eighteen, in the city of Plattsmouth. The trial in the district court resulted in a judgment in favor of the plaintiff in the action—defendant in error here—and the defendant in the court below alleges error and brings the cause into this court for review.

The title of the defendant in error is unquestioned, unless he has been divested of that title by certain attachment proceedings against him in the district court of Cass county, in 1877-8. The plaintiffs in error allege title as grantees of the purchaser at sheriff's sale under the order of sale in attachment.

In August, 1877, John Black commenced proceedings in attachment against the defendant in error in the district court of Cass county. The property in question in this action was levied upon and the defendant in error was notified by publication. Judgment was had, an order of sale issued, and the property sold to C. H. Parmele by the sheriff at public sale. The sale was made on the 24th day of December, 1877. On the 8d day of January, 1878, the

sale was confirmed, and a deed ordered. The deed was executed by the sheriff on the 4th day of April of the same year. It appears that Parmele, soon after receiving his deed, went into possession of the property and retained the possession until the 24th day of May, 1882, when he sold and conveyed it to plaintiffs in error. During this time he paid the taxes and made certain improvements, besides paying taxes for previous years. Upon the purchase of the property by plaintiffs in error they took possession, and have retained possession until the present time, relying in this action upon the title from Parmele. In September, 1882, defendant in error appeared in the attachment suit, filed his answer to the merits, and on his motion the judgment was opened, under the provisions of section 82 of the civil code, that he might make his defense to the action. It seems to be conceded by the parties that no further defense was made to that action, and that judgment was again entered in favor of the plaintiff, Black. But there is nothing in the record before us showing the final disposition of the case.

The contention in this case on the part of plaintiffs in error is, that their title to the property in dispute is unsailable under the provisions of section eighty-two of the code without reference to the final disposition of that case, as by that section it is provided that "the title to any property, the subject of the judgment sought to be opened, which by it, or in consequence of it, shall have passed to a purchaser in good faith, shall not be affected by any proceedings under this section." It is also insisted that if there were any such irregularities in the attachment proceedings as would avoid the sale to Parmele, the general appearance and answering to the merits by defendant in error was a waiver of all questions of jurisdiction and cured any such defects, if they existed, prior to the filing of such answer.

It is contended by defendant in error that the attach-

ment proceedings were void, and that Parmele took no title by his sheriff's deed, and that his after appearance could give no life or vitality to the void proceedings had before that time.

The only objection to the attachment proceedings is that the notice which was published contained no description of the attached property, and therefore the court never acquired any jurisdiction in the case. The notice referred to is as follows:

"In the Cass county district court of the second judicial district of Nebraska.

"John Black, plaintiff, vs. James H. Dick and Margaret A. Dick, defendants.

"To the defendants, James H. Dick and Margaret A. Dick, above named, non-resident defendants:

"You and each of you will take notice that John Black, of the county of Cass, and state of Nebraska, did, on the 3d day of August, 1877, file his petition in the Cass county district court, within and for the county of Cass, in said state of Nebraska, against the said James H. Dick and Margaret A. Dick, defendants, setting forth that the said James H. Dick did, on the 13th day of Nov., 1876, give to the said John Black his, the said James H. Dick's, promissory note for the sum of forty dollars, with interest at 12 per cent per annum, interest payable semi-annually, which time has long since passed, and yet he has not paid said sum, nor any part thereof, but the same remains due and wholly unpaid, and in order to collect the same said John Black has commenced a suit in attachment.

"You are hereby notified to appear and answer said petition September 17th, 1877, according to law and the rules of said court, or judgment will be entered against you by default, and your property sold to satisfy the same."

(Signed, &c.)

The cases of *Wescott v. Archer*, 12 Neb., 345, and *Grebe v. Jones*, 15 Neb., 312, are cited in support of the position or

defendant in error, that the notice was fatally defective, and that the district court did not err in holding the proceedings void for want of jurisdiction. In the former case it was held that the notice must contain a description of the attached property. But this was overruled in the latter, and the notice which recited that an attachment had been issued and levied upon the defendant's property in this state was held good. In the case at bar the defendants were informed by the published notice that the plaintiff "has commenced a suit in attachment," and that unless they appeared and answered the petition a judgment would be entered against them by default, and their property sold to satisfy the same. This was a sufficient compliance with the requirements of the statute, which requires that the notice "must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer."

But, assuming that no jurisdiction had been acquired *by the notice*, did the appearance of the defendant in error waive the objection and give the court jurisdiction over the whole case? We think it did. It is true that at the time defendant in error moved the court to open the judgment and allow him to make his defense he alleged as part of the grounds or reasons upon which his motion was based the defects in the proceedings, that the judgment was void, and that the court had acquired no jurisdiction. But it must not be forgotten that the section (82) by which the right to open a judgment is given is available only in cases where service has been *had* by publication. It was not intended by the legislature that this section should furnish a means of attacking the jurisdiction of courts. Other methods are provided for that purpose. The jurisdiction of the court must in reality be confessed by the very act of filing an answer to the merits. While the code seeks to preserve all the rights of parties to an action, yet it can

only do so upon a consistent course. The jurisdiction of the court is confessed by filing an answer to the merits. In *Cromwell v. Galloway*, 3 Neb., 220, which was an application to set aside a judgment on the ground of defective service, Chief Justice Lake, in delivering the opinion of the court, says: "It is a general, and we think a wholesome, rule of practice, that if a defendant intends to rely upon the want of personal jurisdiction as a defense to a judgment, he must either make no appearance, or, if at all, for the single purpose of questioning the right of the court to proceed; and if he do more than this, and appear for any other purpose at any stage of the proceedings, he shall be held thereby to have waived all defects in the original process, and to have given the court complete jurisdiction over him for all the purposes of the action. * * * * Inasmuch as the question raised was not jurisdictional, but one which necessarily recognized the existence of a judgment that was valid and effective until set aside, and against which they sought the aid of the court that rendered it, we must hold it to amount to a waiver of all irregularities and defects in the summons bearing upon the question of jurisdiction and also to be a general appearance of the case." Citing *Marsden v. Soper*, 11 Ohio State, 503. See also *Kane v. The People*, 4 Neb., 512; *Fee v. Big Sand Iron Co.*, 18 O. S., 563; *Cohen v. Trowbridge*, 6 Kan., 385; 2 Howard's Prac., 241; 6 Id., 441; 7 O. S., 238.

Since the proceedings in the attachment case were not void, it follows that the purchaser at the execution sale is protected in his title under the provisions of section 82 quoted above, and that his title cannot be disturbed, there being no suggestion that he was otherwise than "a purchaser in good faith."

The defendant in error having been divested of his title by the sheriff's deed to Parmele, the court erred in finding

 DONOVAN v. FOWLER.

in his favor, and its judgment must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM T. DONOVAN, PLAINTIFF IN ERROR, v. ALLEN
FOWLER, EXECUTOR, DEFENDANT IN ERROR.

1. **Answer: GENERAL DENIAL.** An answer consisting of a general denial of each and every allegation in the petition places in issue all the allegations contained therein.
2. ———: ———: **BURDEN OF PROOF.** In an action upon a promissory note (in the district court) an answer consisting of such general denial is a denial of the execution of the note, and the burden of proof is upon the plaintiff to establish its execution and delivery before it is admissible in evidence.

ERROR to the district court for Lancaster county.
Tried below before GASLIN, J., sitting for POUND, J.

Foxworthy & Son, for plaintiff in error.

R. D. Stearns, for defendant in error.

REESE, J.

This was an action on a promissory note. The defendant in error (plaintiff below) filed his petition in the district court, which was in the usual form for declaring upon a promissory note, with the additional averments of the decease of the payee and appointment of defendant in error as the representative of his estate. The amended answer of plaintiff in error was a general denial of "each and every allegation and averment" of the petition. On the

17	247
20	164
17	247
30	119
30	432
17	247
35	175
17	247
48	36
17	247
49	438

trial the plaintiff, without any preliminary proof of the execution of the note, offered it in evidence. Plaintiff in error objected for the reason that no foundation had been laid for its admission. This objection was overruled. To this ruling plaintiff in error excepted, and the note was admitted in evidence and read to the jury.

This ruling was erroneous. A general denial puts in issue the truth of all the allegations of the petition, save those which are excepted by the statute—of which the execution and delivery of a written instrument is not one—and the plaintiff, to maintain his action, must prove all the material facts therein stated. Maxwell's Pleading and Practice, 3d edition, 93. Section 99, civil code. *Dinsmore & Co. v. Stimbert*, 12 Neb., 488. Abbott's Trial Evidence, 391. Moak's Van Santvoord's Pleadings, 512. *Holmes v. Riley*, 14 Kas., 131. The execution and delivery of the note was denied by the answer. The burden of proving its genuineness was upon the plaintiff in the action. Until that proof was made it was not admissible in evidence. The objection should have been sustained.

As the other questions presented by the record are not likely to arise in another trial they will not be noticed.

The judgment of the district court is vacated and a new trial ordered.

REVERSED AND REMANDED.

THE other judges concur.

JOHN KIEWIT, PLAINTIFF IN ERROR, V. HARRIS &
FISHER, DEFENDANTS IN ERROR.

Action on Account: DEFENSE: PAYMENT: EVIDENCE. Plaintiff brought an action against defendants for a balance due on the price of certain brick alleged to have been sold them and used in the construction of a certain brick building erected by them. The answer of defendants was a general denial. On the trial one T. testified that he was the contractor who furnished the material and constructed the building in which the brick were used. That he purchased the brick of plaintiff, and the payments made on the price were made by him for himself to plaintiff, and for which plaintiff had executed to him certain receipts "on account." These receipts were introduced in evidence. Defendants also, over the objection of plaintiff, introduced in evidence the contract by which T. agreed to furnish the brick and construct the building. *Held*, That the admission of the contract was not error; there being no recitals therein which could prejudice plaintiff. *Held, also*, That if the contract was not essential to the defense, and therefore not necessary, the error was without prejudice.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

Redick & Redick and Charles R. Redick, for plaintiff in error.

George W. Doane, for defendant in error.

REESE, J.

This action was commenced in the district court of Douglas county for the recovery of the sum of \$802.20 alleged to be due the plaintiff from the defendants for brick furnished them for the construction of a packing house in Omaha. A trial was had, resulting in a verdict and judgment in favor of the defendant. The case is brought to this court by plaintiff, upon error, for review.

Certain instructions given to the jury are complained of in the brief of plaintiff in error, but as no exceptions were taken to them upon the trial they were abandoned in the argument, and need not be here noticed.

The only remaining point urged on the hearing in this court is, that upon the trial of the cause to the jury the court erred in admitting in evidence a written contract for the construction of the packing house, made between the defendants and the firm of Turtle Brothers, who were not parties to the action. The petition alleges in substance that the brick were furnished to defendants in pursuance of the contract therefor. That Turtle Brothers, who had the contract for the construction of the building, were, at the time the brick were delivered, wholly insolvent and worthless, which fact was known to plaintiff and defendants. But that the defendants and said contractors confederated and conspired together to defraud the plaintiff out of his claim, and to further their purpose caused certain payments, amounting in all to about nine hundred dollars, on said brick to be made by Turtle Brothers, but that such payments were placed to the credit of defendants. That defendants have not paid the contractors in full for their labor, but hold in their hands five or six hundred dollars, with the understanding and agreement between defendants and said contractors that if they together could defeat plaintiff in his efforts to collect his claim a division of said money was to be made between them. The answer is a general denial.

The contention on the trial on the part of plaintiff was, that he sold and delivered the brick to defendants at the building as it was constructed. That he had nothing to do with Turtle Brothers, and that defendants alone were responsible to him for the balance due. On the part of defendants it was contended that they had nothing to do with plaintiff in the matter of the purchase of the brick. That upon his suggestion they had given the contract of

furnishing the brick and constructing the packing house to Turtle Brothers. That they had paid Turtle Brothers all that was due them, and that the money paid plaintiff by Turtle Brothers was paid on their own account and receipted for to them and not to defendants. The Turtle Brothers testified that the money paid by them was paid on their own account. The receipts, five in number, were of the same general form, and reciting that the money was received of Turtle Bros. to apply on account. The contract, to the admission of which plaintiff complains, is as follows:

"We the undersigned agree to do the brick work on Harris & Fisher's packing house and smoke house in a good, substantial manner, using nothing but good, sound brick, and laying none but hard brick in cellar. Our work to be paid for at the rate of nine dollars per thousand, wall measurement, when the buildings are completed."

While we are unable to see that this contract was particularly essential to the defense, yet it was in the line of the theory upon which the defense rested. The fact that the contract was made with Turtle Brothers for both the material and labor, and that plaintiff recognized that fact and recognized Turtle Brothers as his debtors, tended to sustain the defendants' side of the case. But we are entirely at a loss to see how the introduction of this instrument could prejudice the rights of plaintiff. He alleged in his petition that a contract of the kind existed, and that fact was not controverted by him on the trial, notwithstanding he offered no proof of the fact nor of the fact of the conspiracy. There are no recitals in the contract which could prejudice his case any further than the simple fact of its existence could. If there was any error it was certainly without prejudice. It is not every error which will justify a reversal of a judgment. The record must show affirmatively not only that error has intervened but that it was prejudicial to the party seeking to take advantage of it. *Dillon v. Russell & Holmes*, 5 Neb., 484.

There was sufficient evidence to sustain the verdict of the jury, and no error appearing from the record the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	253
21	232
17	252
28	378
17	252
43	686
17	252
56	380

HELEN A. HERDMAN, APPELLEE, v. LINUS M. MARSHALL ET AL., APPELLANTS.

1. **Pleading: REPLY TO ANSWER.** A reply to an answer denying each and every allegation contained in the answer inconsistent with the statements of plaintiff's petition is defective and an insufficient denial of the allegations of the answer, and upon motion to make more specific will be held bad; and unless amended so as to conform to the code will be treated as no denial. But if upon such denial the parties go to trial, treating it as a sufficient denial, it must be so treated in all stages of the case.
2. **Limitation of Actions: MORTGAGES.** An action upon a mortgage will not be barred until ten years from the time the cause of action accrued. *Cheney v. Cooper*, 14 Neb., 415.
3. **The evidence in the case examined, and the decision of the district court, Held,** To be correct.

APPEAL from the district court of Johnson county.
Heard below before BROADY, J.

Harwood, Ames & Kelly, for appellant.

Babcock & Davidson, for appellee.

REESE, J.

The plaintiff and appellee filed her petition in the district court of Johnson county on the sixteenth day of Jan-

uary, 1882, by which she sought the foreclosure of a mortgage on certain real estate executed to her by E. Collingwood, by W. Wames, his attorney in fact, on the sixteenth day of January, 1874, for the purpose of securing the payment of a promissory note of the said Collingwood, executed of that date in his name by said attorney in fact, for the sum of \$3,000, due and payable on the sixteenth day of January, 1877.

The pleadings in the case are quite voluminous, but in order to a full understanding of the case it seems necessary that they be substantially given.

The petition states substantially that on the said sixteenth day of January, 1874, the defendant, Collingwood, being indebted to the plaintiff in the sum of \$3,000, executed to her, under the name of Nellie W. Amos, the note and mortgage declared on, and which are properly set out in the petition. It is alleged that W. Wames, the attorney in fact, was duly authorized to execute the note and mortgage by a power of attorney properly executed and recorded, and that the mortgage was duly recorded in the mortgage records of Johnson county, and that the same was a valid and subsisting lien upon the real estate described therein. That the debt was due and unpaid, no payments having been made thereon, and that no proceedings had been had at law to collect the debt secured by the mortgage. She then avers that the other defendants, naming them, each claim some interest in or lien upon the mortgaged premises, the true nature of which is unknown, but inferior and subsequent to her mortgage. She asks that they be made defendants and her mortgage foreclosed against them as well as against Collingwood.

The defendants, excepting William S. Amos and E. Collingwood, answer jointly, alleging in substance that the legal title to the mortgaged premises is in William S. Amos, the father of plaintiff, and the pretended defendant Edward Collingwood in truth and fact is the said William S. Amos;

the name Collingwood being another and assumed name of said Amos, and that the names "William W. Amos" and "Nellie Wames, attorney in fact," are assumed names of the defendant William S. Amos. That the said William S. Amos *alias* William Wames *alias* Edward Collingwood, in the spring and summer of the year 1870, and previously thereto, resided in the city of St. Louis, and was engaged in business therein as a dealer in lumber, shingles, and building material, under the style and name of W. S. Amos and Company, and under said style and name became largely indebted to the defendants severally, the amounts of which debts are alleged in the answer. It is alleged that William S. Amos was the sole and only proprietor of said business, and that the debts contracted by said William S. Amos and Company were the debts of William S. Amos solely. That immediately after contracting the said indebtedness, in the month of November, 1870, the said William S. Amos, for the purpose of defrauding them and preventing them from collecting their claims against him, secretly and clandestinely disposed of and converted his property into money, and in the night time absconded and ran away from his place of business and from the said city of St. Louis, and did fraudulently conceal himself in Nebraska under the assumed names of William Wames *alias* Edward Collingwood, and so continued to conceal himself until in the month of July, 1877, when he was accidentally discovered by one of the answering defendants. That in the year 1872 he, with his own means, purchased and paid for the real estate in question, and for the purpose of concealing it from his creditors caused the title to be made and to appear of record in the name of Edward Collingwood, and that on and prior to the sixteenth day of January, 1874—the date of the mortgage declared on by plaintiff—and also up to the time of filing the answer, the said William S. Amos was the owner in fee simple, absolutely free from incumbrance, of said land, except as to the rights

of said defendants, notwithstanding it appeared upon the county records in the name of Edward Collingwood. It is also alleged that about the sixteenth day of January, 1874, said William S. Amos conspired and confederated with the plaintiff, who then assumed and was known by the name of Nellie Wames, but whose real name was Helen Amos, and to carry out his fraudulent purpose did, by the assumed name of E. Collingwood, the real name of said Collingwood being William S. Amos, by William Wames attorney *in fact*, that being another of the assumed names of said Amos, without any consideration from plaintiff, Nellie Wames, or from any other person, assume and pretend to execute and deliver to said Nellie Wames the mortgage upon which the suit is based, but that the said Amos was not indebted to Nellie Wames, plaintiff, in any sum whatever. That said mortgage was never delivered to said Nellie Wames by said Amos, and never became a lien upon the property as against any person, and that as against the defendants it is wholly void. It is also alleged that the several claims and demands of the answering defendants have been reduced to judgments against the said Amos, and that they are still in force unsatisfied and unpaid, their dates and names of the courts in which they were rendered being set out at length. That executions have been issued on each of said judgments, but all have been returned unsatisfied for want of property on which to levy. That aside from the land in dispute they know of no property of the said William S. Amos, but that all of his property is so concealed that it cannot be found. All interest of the plaintiff in the property is denied, and it is sought to have the mortgage canceled and adjudged to be void, and the land decreed to be the property of William S. Amos and made subject to defendants' executions.

The reply of the plaintiff "denies each and every allegation in said answer contained inconsistent with the statements in plaintiff's petition herein contained." The reply

also specifically denies that the title to the real estate in question is in William S. Amos, and also denies all allegations which charge plaintiff with conspiring with William S. Amos to delay or defraud his creditors, and alleges that the land is the property of E. Collingwood.

Upon these issues the cause was tried.

No evidence was offered by the plaintiff except the mortgage, which was received without objection. The defendants, to sustain the issues on their part, offered and read the deposition of the plaintiff taken on the ninth day of December, 1881, in an action then pending in the United States circuit court for the district of Nebraska, in which Linus M. Marshall and others were plaintiffs and W. S. Amos and others were defendants. No other testimony was introduced. A decree was entered in favor of plaintiff foreclosing the mortgage. From the decree defendants appeal.

The first question presented for decision is as to the proper construction of the pleadings. It is insisted by appellants that the reply is and should be treated as an admission of all the allegations of the answer not specifically denied. That the denial in the reply of "each and every allegation in said answer contained inconsistent with the statements in plaintiffs petition," is not a denial of any allegation of the answer, and therefore the allegations that William S. Amos, William Wames, E. Collingwood, and Edward Collingwood are one and the same person, and Nellie Wames, his daughter, is the plaintiff; that Amos ran away from St. Louis owing the debts due defendants, and secreted himself in Nebraska under one of the above aliases; that plaintiff participated and aided in such concealment by changing her own name to correspond with the assumed name of her father; that the land in controversy was purchased with his own money; that he made the mortgage in suit in one of his assumed names, by another assumed name as attorney *in fact*, to another assumed

person called Nellie Wames, and that there were no such persons as William Wames, Collingwood, or Nellie Wames, stand admitted.

It is as confidently contended, upon the other hand, that the reply was treated by all parties in the court below as a denial of all the allegations of the answer, except the fact of the indebtedness of Amos and the rendition of the judgments against him, and that good faith would require it to be so treated in this court, even were the reply defective.

It must be conceded that a denial of all allegations of an answer which are inconsistent with the petition falls short of the general denial prescribed by the code, and if objected to by the proper motion to make it definite and certain (Maxwell's Pleading and Practice, 3d edition, 94) it would have been held bad, and the pleader would have been required to specifically state what allegations of fact he denied. But such a course was not pursued. An examination of the record will show conclusively that the reply was treated as a denial of all allegations of the answer except those above named. It was so treated in the district court, it must be so treated here. If an objection is to be made at all it should be made on the trial, so that the party filing the pleading will not be taken by surprise. *Neis v. Franzen*, 18 Wis., 542.

Again, the reply denies that the title to the land in question is the land of Amos, and denies all that part of said answer which charges her with conspiring and confederating with said Amos to delay or defraud the defendants or any of his other creditors. It is provided by section 121 of the civil code that, "In the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties." Applying this rule to the reply in question, it would seem to justify the course pursued by the parties upon the trial in the court below.

The questions presented by the testimony were submit-

ted to the trial court, and it would seem that its decision thereon should be final. But as all the testimony was given by one witness upon the part of the defendants, unless that testimony is clearly self-contradictory it must stand as sufficient to sustain the finding of the court upon the several propositions necessarily involved in the finding. It is insisted that Collingwood and Amos and Wames were the same person. It must be conceded that Wames and Amos were the same, and that Amos, for the purpose of concealing his identity no doubt, took upon himself the name of Wames. But there is absolutely no proof that Collingwood was the same person as Wames and Amos. Indeed, the only witness whose testimony we have testifies he was not. In her answers to questions thirty-two and thirty-three she testifies that Collingwood was not present when the note and mortgage were executed, but Wames was. In her answers to questions thirty-six *et seq.* of her deposition, she testified that she had seen Collingwood some twenty years ago in Milwaukee; that she was acquainted with him when they were young; that in later life she understood him to be a man of means; that she, upon her father's request as his, Collingwood's, agent, loaned him the money secured by the mortgage, paying it over in Judge Pound's office in Lincoln. The witness further testified that she paid it out of her own funds given her by her mother, who inherited it from her uncle, Dr. Herdman, who died in Scotland. In the redirect testimony of this witness she is asked if she does not know that Collingwood, so far as he was doing business in Nebraska, was a mere myth, and that it is the name in which her father did business to avoid creditors. To which she answered she did not. It is further to be observed that the only testimony upon the question of consideration is from the same witness, as given above. The want of consideration is not shown. But if such want were shown it would still be unavailing to defendants, unless they made it appear

that the land was the property of Amos. Having failed to do this to the satisfaction of the trial court, the question of consideration or the want of it becomes unimportant. The testimony of the plaintiff on behalf of the defendants is, to the mind of the writer, very unsatisfactory. Whether prompted by a desire to suppress the truth, or laboring under, to her, unusual embarrassment, it is not easy to determine. But the former presents itself to the mind as the probable reason for the many imperfect answers found in her deposition. But it must be borne in mind that this testimony is introduced for the purpose of establishing certain facts for the defendants. They call her as a witness for the purpose of maintaining *their* case. Her testimony does not do it. It may be she is a very bad witness, yet that fact, if true, does not establish the converse of what she deposes.

It is insisted that the plaintiff's claim is barred by the statute of limitations. The note matured January 16, 1877. The petition was filed January 16th, 1882. It has so frequently been held that a suit to foreclose a mortgage is not barred until the lapse of ten years that it can no longer be considered an open question. *Hale v. Christy*, 8 Neb., 264. *Stevenson v. Craig*, 12 Id., 464. *Cheney v. Cooper*, 14 Id., 415. *Gatling v. Lane*, ante p. 77.

The question of the constitutionality of the amendatory act extending the limitation to ten years is fully discussed in the opinion on the motion for rehearing in *Gatling v. Lane*, *supra*, and nothing further need be here added. We are satisfied with that decision.

Whatever there may be of suspicion and doubt surrounding this case, we do not think it can be said, in the light of the evidence, that the decision of the court below was wrong.

The decree of the district court must therefore be affirmed.

DECREE AFFIRMED.

JOHN I. REDICK ET AL., PLAINTIFFS IN ERROR, V. JAMES M. WOOLWORTH, DEFENDANT IN ERROR.

Contract: CONSTRUCTION. The contract, as set up in the petition and stated at length in the opinion, *Held*, Not void, as contravening the provisions of any statute repugnant to justice against the general policy of the common law, or as tending to impede the due administration of justice.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

Redick & Connell, for plaintiffs in error.

James W. Savage, for defendant in error.

COBB, CH. J.

The plaintiffs, in and by their petition in the court below, alleged that about the year 1874 the defendant, who was then and still is practicing law in the city of Omaha, put into the hands of Charles H. Sedgwick, who at that time and until about the year 1877 was a practicing lawyer in the said city, a certain claim or demand which he, said defendant, had control of, against one Henry Tucker, with the agreement and understanding between said defendant and said Sedgwick that said Tucker should be forced into bankruptcy, and if the said Sedgwick should be made assignee of said estate the said Sedgwick should attend to the business as far as consistent with his said trust, and he, said Sedgwick, should receive one equal half of all attorney's fees charged and received by said defendant, and said defendant was to receive one equal half of all commissions charged and received by said Sedgwick as such assignee when said estate should be finally closed; that in pursuance thereof proceedings were commenced against said Tucker in bankruptcy, and the said Sedgwick was made

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assignee, and a long, tedious, and difficult litigation followed, and said Sedgwick took charge of the same and did the entire labor and business in connection therewith, and in all things said Sedgwick lived up to his said agreement, and all commissions received by him were divided between him and the said defendant, as well also as a retaining fee of five hundred dollars paid said defendant soon after said suit was commenced; that said cause was taken to the supreme court of the United States and there affirmed, which finally settled all litigation touching said estate; that about the month of April, 1878, the plaintiffs, with the knowledge and consent of said defendant, purchased of said Sedgwick his interest in all fees and commissions in said suit thereafter paid or to be paid to said defendant, and paid therefor about the sum of eight hundred dollars, and thereafter, with the consent of said defendant, said plaintiffs were to be subrogated to the rights of said Sedgwick therein; and that about the month of May, 1880, the said defendant received as further attorney's fees in said action the sum of about eighteen hundred dollars, all of which he retains, and refuses to account for or pay over to the plaintiffs or said Sedgwick said sum of money or any part thereof, though he has been often requested so to do, etc. Wherefore plaintiffs allege that he is justly indebted to them in the sum of one thousand and fifty dollars, etc.

The defendant for answer denied that he ever put into the hands of said Sedgwick any claim or demand against one Tucker with the understanding or agreement between said defendant and said Sedgwick that said Tucker should be forced into bankruptcy, or that said Sedgwick if made assignee of said estate should attend to the business as far as consistent with said trust, and he, said Sedgwick, should receive one equal half of all attorney's fees charged and received by said defendant, or that said defendant was to receive one equal half of said Sedgwick's commissions as charged and received by him as such assignee. He further

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denied that in pursuance of any such agreement or understanding proceedings were commenced against said Tucker in bankruptcy, or that said Sedgwick took charge of or did the entire labor or business in connection with a litigation in connection with said bankrupt's estate, or that in all or any matters connected with the same lived up to any agreement alleged in said petition, or that all commissions received by him were divided between him and defendant. He also denied that said plaintiffs, with defendant's knowledge or consent, purchased of said Sedgwick his interest in all or any fees or commissions in said suit thereafter paid or to be paid to said defendant, or that said plaintiffs were to be subrogated to the rights of the said Sedgwick therein. Defendant denied that he had received commissions to the amount of \$800 or \$400, or that he is indebted to the said plaintiffs in any sum whatever.

For a second and further defense the defendant alleged that at the time the said Sedgwick was made assignee of the said estate of said bankrupt, he, the said Sedgwick, applied to the defendant to sign the bond which as such assignee he was required to give; and that defendant did thereupon sign the bond in such case made and provided, and thereby became security that said Sedgwick should faithfully perform his duties as such assignee and pay over all moneys coming into his hands to the proper persons and at the proper times; but the said Sedgwick did not properly execute his trust as such assignee, and collected moneys to the amount of \$760 which he failed to pay over as his duty required him to do, and finally left the state of Nebraska and abandoned or was removed from his said trust, and thereupon William L. Peabody was appointed assignee in his place and stead; that the United States district court for the district of Nebraska, sitting in bankruptcy, upon due notice to the parties concerned, ascertained the amount of the assets of said bankrupt estate which had come to said Sedgwick's hands and was by him unaccounted

for as \$760, and made an order on him to pay the same to said Peabody as assignee aforesaid, etc., and that defendant paid to said Peabody the said sum of \$760 for said Sedgwick, and the said Sedgwick thereupon become liable to defendant for the repayment of such sum, and was so liable at the time of the pretended assignment to the plaintiffs in this action; but neither the said Sedgwick nor any person for him has paid the said sum or any part thereof. The defendant therefore claimed to set off the said sum of \$760, with interest from the time of the payment thereof, against any sum, if any, which might be found due from defendant.

The said answer also contains a third and fourth defense, but which it is deemed unnecessary to further notice in this connection.

There was a reply on the part of the plaintiffs denying the several matters of defense set up in the answer.

There was a trial to a jury, a verdict for the defendant by direction of the court, a motion for a new trial overruled, a judgment for the defendant, and the cause brought to this court on error.

It appears from the bill of exceptions that the plaintiffs offered in evidence in their behalf a deposition of Charles H. Sedgwick. When they came to the sixth interrogatory, which was in the following words, "Int. 6. What was the understanding and arrangement between you and the defendant, if any, with reference to business or claims he might place in your hands?" the defendant objected, or rather renewed an objection to the said interrogatory that had been made at the taking of the deposition, on the ground that the said interrogatory was incompetent, irrelevant, immaterial, and improper, for the reason that it was "an attempt to prove a contract that was void as against public policy, and void as an attempt to impede the due administration of justice," which objection was sustained; and the answer of the witness, which was as follows, "I

was to have one-half of the fees, costs, and commissions in all such cases," was excluded. When offered, the same objection was made to interrogatories 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18, and was sustained.

It appears also from the bill of exceptions that upon the trial W. J. Connell, one of the plaintiffs, was sworn as a witness on behalf of the plaintiffs. After having testified that he was acquainted with the defendant and Charles H. Sedgwick, and to other facts introductory in their character, the witness had propounded to him by the party calling him the following question: "Q. What do you know about his (Sedgwick's) proposing to sell you a claim for law fees which he claimed to be entitled to in the case of Albert Tucker, bankrupt, where one Henry figured at a time when he was not assignee in bankruptcy?" Which question was objected to by counsel for the defendant as irrelevant and immaterial, for the reason that there is no evidence showing that any service had been performed or that any fees were due Mr. Sedgwick, and also for the reason that the only claim set up in the petition is for half of the fees as attorney and assignee, which, as alleged in the petition, were to be divided between the defendant and Sedgwick. Which objection was sustained and the evidence ruled out. The plaintiffs thereupon made a formal offer to prove by the witness then on the stand "that Sedgwick came to him, W. J. Connell, with a letter proposing to sell him his right to this Tucker claim for so much money, and that he (witness) afterwards suggested to John I. Redick that he buy it in company with him; that they did buy Sedgwick's claim under that contract set up in the petition, and paid him \$930 in money for it; that before Redick and Connell would buy, at the suggestion of Redick, Connell went to see the defendant and had a long conversation with him about it, and told him they were going to buy Mr. Sedgwick's interest in that claim; that the defendant told him to buy it, and said he had no interest in that half of it, and

induced Redick and Connell to invest \$930 in that claim." This testimony was objected to by defendant's counsel as the last above, and also on the ground that the only claim set up in the petition is an illegal claim and cannot be recovered, which objection was sustained, and the said evidence was ruled out.

There was other evidence tending to prove the facts stated in the petition offered by the plaintiffs and ruled out by the court on objections offered by the defendant; but as the law upon which the case must turn sufficiently arises upon the above, it is deemed unnecessary to add to the record already quoted.

There can be no doubt that if the claim of the plaintiffs as set up in their petition was founded upon an agreement to do something forbidden by law, or for the doing of which the law has fixed a penalty which has a tendency to prevent or impede the due administration of justice, is subversive of morality, or contrary to sound public policy, the testimony was rightly excluded, and there could be no recovery under the petition or upon the testimony offered. On the side of the defendant it seems to be taken as conceded that there was something unlawful or wrong in the things which, according to the petition, the defendant and the plaintiffs' assignor agreed to do; and the authorities cited are to the effect that a contract to do an unlawful, wrong, or immoral thing, or one against morality or good policy, will not be enforced in a court of law.

The case of *Waldo v. Martin*, 4 B. & C., 319, was: "Where A, who held an office for life in the gift of B, agreed with C to resign, and to procure the appointment for him, and C, in consideration thereof, agreed that A should have a moiety of the profits; A resigned, and through his influence C was appointed and executed a deed for the performance of the agreement. The agreement was not communicated to B. In covenant by A against C for not paying over to him a moiety of the profits of the office,

Held, That the agreement was a fraud upon B, and therefore illegal and void." By reference to the opinion of Abbott, C. J., in this case, it plainly appears that the case was not decided upon any question of public policy or the unlawfulness of the contract between A and C, except in so far as it was a fraud on Mr. Farrar who held the appointing power.

The case of *Bills v. Comstock*, 12 Met. (Mass.), 468, was where "a justice of the peace sentenced a prisoner whom he had convicted of larceny to pay a fine and costs, and, on his failure to pay them, delivered a mittimus to an officer, who, while conducting the prisoner to jail, took the promissory note of a third person for the amount of the fine and costs and his own fees, payable to the justice, and discharged the prisoner." Upon the suit brought by the justice on the note, it was held that the note was void for illegality of the consideration.

In the case of *Gray v. Hook*, 4 Coms. (4 N. Y.), 449, it was held that "where two persons apply to the governor of the state to be appointed to the same office, and it is agreed that one of them shall withdraw his application and aid the other in procuring the appointment, in consideration of which the fees and emoluments of the office are to be divided between them, such contract is illegal and void."

In the case of *Sharp and Sharp v. Teese*, 9 N. J. Law, 852, it was held that, "a note given by an insolvent debtor to two of his creditors in consideration of their withdrawing their opposition to his discharge under the insolvent act, is void, it being against the policy of the insolvent law."

In the case at bar, the petition alleges that the defendant furnished certain claims against a certain bankrupt merchant, in consideration of which the plaintiff's assignor agreed to furnish the labor and professional skill necessary to the successful prosecution of said claims in bankruptcy, that he would, if he could, procure himself to be elected assignee of said bankrupt, and that all fees and commissions,

both as attorney and as assignee, should be divided equally between the two.

Mr. Bump, in his work on the Law and Practice of Bankruptcy, p. 133, states the law to be that an attorney for a creditor may be chosen assignee of a bankrupt's estate, and he cites as authority for the statement two adjudicated cases: *In re Lawson*, 2 Bankruptcy R., 396, and *In re Barrell*, Id., 583. We are cited to no authority, nor am I able to find any to the contrary. I see nothing inconsistent in the duties of the two positions. The creditors by number and value have the selection of the assignee, and they alone are interested therein, and with their selection the bankruptcy court will not interfere, except for certain specified causes. It may be proper to speak of the position of assignee of a bankrupt estate as an office, but certainly only in the broadest and most comprehensive use of that term. It is not a public office. We are cited to no authority declaring it illegal for a person holding an office to bind himself for a lawful consideration to divide the fees of such office with another. Yet I think that it would be against public policy to treat the fees and emoluments of a public office, as such, as a proper subject of bargain and sale. But the reason for this does not apply to the fees of an assignee in bankruptcy, and I fail to see any good reason why, for a lawful consideration, such assignee could not legally obligate himself to divide his emoluments with another, as well as could a carpenter his contract price for building a house.

As I understand the petition in the case at bar, the defendant furnished the claims, or in other words, they were sent to him through the commercial agency, and defendant allowed Sedgwick to present, sue, and control them, using the name of the defendant as the attorney for the said claimants, though Sedgwick was the actual attorney. Accordingly there were two considerations on the part of Sedgwick for the agreement by the defendant to divide

the attorney's fees with him: *First*, His professional services as an attorney in earning the fees to be divided; and *Second*, The division by him, or agreement to divide with the defendant his fees or pay as assignee. If either one of these considerations were void by reason of being in contravention of the provisions of any statute, opposed to any recognized principle of public policy, or that their enforcement would tend to the prevention or to impede the due administration of public justice, then the entire contract would be incapable of enforcement. But I do not think that such grounds of objection or either of them can be sustained.

I therefore reach the conclusion that the trial court erred in excluding the deposition of Sedgwick. It necessarily also follows that the court erred in rejecting the testimony and offer of testimony of W. J. Connell, the same being testimony proper for the consideration of the jury on the question of estoppel.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

ELLIS L. BIERBOWER, PLAINTIFF IN ERROR, V. ANNA POLK, DEFENDANT IN ERROR.

1. **Assignment: PREFERRING CREDITORS.** The act of the legislature of 1877 relating to voluntary assignments, Compiled Statutes, 1881, Chap. 6, did not prevent a debtor in failing circumstances from preferring a creditor by a separate and independent conveyance unconnected with the transaction of making an assignment.

17	268
17	428
18	453
19	48
20	54
29	504
17	268
30	131
31	533
17	268
45	140
17	268
50	419

2. — — —: — — —: CHATTEL MORTGAGE. When a debtor executed a chattel mortgage to secure the payment of a *bona fide* pre-existing debt, and soon thereafter executed a general assignment of his property for the benefit of his creditors, but which assignment was abandoned by the assignee and all parties interested, and the mortgaged property taken possession of by the mortgagee, the mortgage will be upheld even though it was executed on the same day and near the same time at which the assignment was executed.
3. — — —: VERDICT: SPECIAL VERDICT: EFFECT. When the general and special verdicts of a jury are consistent with each other and are supported by sufficient evidence, the special verdict will be treated as final upon all questions directly passed upon by such verdict.
4. Evidence: CROSS-EXAMINATION: RE-EXAMINATION. When a witness was called to testify as to the value of a stock of goods which he had been called to appraise, and when the value as given by him in his testimony exceeded the value as ascertained by the appraisement, and upon cross-examination it was shown that he was present at a sale afterwards made, and for the purpose of showing that his valuation of the whole stock was wrong, it was sought to be shown by him that the goods were well sold, that he made purchases at such sale, and the whole proceeds were much less than the valuation fixed by him, it was not error for the court to permit the witness to testify on re-examination as to what goods he and others bought, what they paid, and what was their value, for the purpose of showing the correctness of the estimate of value as testified to in his examination-in-chief.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Lamb, Ricketts & Wilson, for plaintiff in error.

Harwood, Ames & Kelly, for defendant in error.

REESE, J.

This action was brought in the district court by defendant in error against plaintiff in error for the value of a stock of goods which, it is alleged, was the property of de-

fendant in error (plaintiff below), and which she alleges was converted by plaintiff in error.

Plaintiff in error answered setting up four defenses, which may be summarized as follows: 1st. A general denial. 2d. That at the time of the alleged conversion he was the United States marshal for the district of Nebraska, and that the goods in question were seized by him by virtue of a certain order of attachment issued out of the circuit court of the United States for the district of Nebraska against one C. W. Chambers, who was the owner thereof, and that they were afterwards sold by him under an order of sale duly issued out of said court. That the title of defendant in error to said goods is by virtue of a pretended chattel mortgage made by said Chambers to defendant in error on the 19th day of February, 1888. That prior to the 1st day of September, 1882, defendant in error and said Chambers were doing business in Lincoln as partners, under the firm name of C. W. Chambers and Co., and that Chambers was the managing partner in said firm. That at that time said firm or partnership was dissolved, and Chambers continued in the business, giving to defendant in error his promissory notes for a large amount and running for a long time, with the secret and fraudulent understanding and agreement that in case he should become embarrassed, financially, he should give her security in preference to others to whom he might become indebted. That said dissolution and agreement were secretly and fraudulently made without the knowledge or consent of the creditors of said firm, and with the understanding that Chambers would buy goods on credit thereafter, his credit and standing in financial circles having been made good by his association with defendant in error, who was a near relative of his and of reputed wealth. That on the said 19th day of February, 1883, the said Chambers having become insolvent, and being then about to fail in business, without the knowledge or consent of defendant in error, executed to her the chat-

tel mortgage in question to secure the notes remaining unpaid, amounting to the sum of \$4,288.18, and caused the same to be filed in the office of the county clerk of Lancaster county, and at the same time and as a part of the same transaction he secretly and fraudulently executed to one C. T. Boggs a pretended general assignment of all his property for the benefit of his creditors. That said mortgage and the said assignment were in law one and the same instrument, both made in pursuance of the same purpose and design—that of hindering and defrauding the creditors of said Chambers. That Boggs, under the advice and counsel of said Chambers and his attorneys, and for the purpose of carrying out the fraudulent design and purpose of Chambers, pretended to accept the trust imposed by said assignment, took possession of said store, closed the doors, placed a placard in the window to the effect that he held possession under the assignment, and so continued to hold possession until near the close of the thirty days in which he was allowed by law to file the assignment with the clerk, execute the necessary bond, and file his inventory, but that instead of so doing, and in pursuance of the general plan, he secretly yielded the possession of the store to the defendant in error, who then took possession claiming to hold under her mortgage, and refused to file the assignment or qualify as assignee, and that nothing further was done under the pretended assignment. That the pretended assignment and the pretended chattel mortgage were but part of one and the same transaction, and were made for the sole purpose of hindering, delaying, and defrauding the creditors of Chambers. That the assignment and mortgage were both fraudulent and absolutely void, and that the pretended possession of defendant in error of said goods was only the possession of Chambers under the fraudulent design set forth in the answer. 3d. That in case said mortgage should be held to be valid, the defendant in error should be required to account for certain goods of the value

of \$1,500, seized and appropriated by her out of said stock of goods, and for the sum of \$1,500 in money of said Chambers collected by her, and that said sum of \$3,000 should be credited on said notes and go to discharge and reduce the lien of the mortgage if any there be. 4th. That there were tax liens on said goods at the time of the levy, to the extent of \$110, which reduced their value to that extent.

The reply of defendant in error admits the alleged co-partnership, the dissolution thereof in August, 1882, the sale of the interest of defendant in error to Chambers for the amount alleged by plaintiff in error, and the execution of the notes therefor; that at the time of the sale it was agreed that if at any time the interest of defendant in error should require it, Chambers should pay or secure said notes and should in case of the absence of defendant in error employ counsel for her to represent her in taking such security or payment; that from August 26th, 1882, to February 19th, 1883, Chambers conducted the business in his own name as sole proprietor; that Gage & Co. (mentioned in the answer) commenced and prosecuted the attachment proceedings, caused the seizure and sale of the goods as alleged, and that they, at the time of such seizure, were in the possession of defendant in error under the mortgage; that the mortgage was executed on the day alleged by plaintiff in error, and that on the same day, after the execution and delivery thereof, Chambers executed a general assignment for the benefit of creditors, in which Boggs was named as assignee; that the attorneys under whose direction the mortgage was made, as the agents and attorneys of defendant in error, were retained for her by Chambers, pursuant to his previous agreement to do so; that at the time of the execution of the mortgage defendant in error was temporarily absent from the state and that the assignment was never filed for record; that on the day of the execution and delivery of the assignment to Boggs he posted a notice on the store door that the store was closed under the assignment,

and that before the expiration of thirty days from the date of the assignment defendant in error took possession of the store and goods under her mortgage, and that her sole claim or title to the property is the mortgage and possession thereunder. All other allegations of the answer are denied.

The cause was tried to a jury who returned a verdict in favor of defendant in error for the sum of \$3,245.00. The jury also, under the direction of the court, at the request of plaintiff in error, returned a special verdict as follows:

1. "Was C. W. Chambers insolvent on the 19th day of February, 1883, the date of the mortgage and assignment?" Answer. "We cannot say."

2. "Had Chambers determined on that day, prior to the making of the mortgage in question, to make a general assignment of his property for the benefit of his creditors?" Answer. "No."

3. "Had Chambers selected his proposed assignee prior to the time of the execution of the mortgage in question?" Answer. "No."

4. "Was the mortgage and assignment executed at or about the same time by Chambers?" Answer. "Nearly the same time."

5. "Were the two instruments executed by Chambers for the purpose of transferring all his property for the benefit of his creditors?" Answer. "The mortgage to secure Mrs. Anna Polk, the assignment to secure the balance of creditors as far as possible."

6. "Was the mortgage in question executed by Chambers at or about the time he executed the assignment for the purpose of giving a preference to the plaintiff, Mrs. Polk?" Answer. "The mortgage was executed independent of the assignment to secure the plaintiff's (Mrs. A. Polk) claim."

7. "Was the assignment delivered to Boggs, and did

he take possession of the goods as assigned before the plaintiff had notice of the making of the mortgage?" Answer. "No; plaintiff had notice through her counsel."

8. "Were the mortgage and assignment both drawn by the same firm of attorneys under the same retainer and employment by Chambers?" Answer. "By the same firm, but not under same retainer and employment."

9. "Was the receipt of the telegram by the plaintiff in the state of Mississippi on the 20th day of February, 1883, the first notice the plaintiff had of the execution of the mortgage in question?" Answer. "Personally, yes; but her counsel had been notified previously."

A motion for a new trial was made by plaintiff in error, which was overruled, and a judgment was rendered on the general verdict in favor of defendant in error. The proper exceptions having been entered, the plaintiff in error brings the case into this court upon error for review. The points relied upon by plaintiff in error will be discussed in the order in which they occur in his very excellent brief.

The first question presented is, that the court erred in overruling the motion of plaintiff in error for a new trial, and in this connection it is said "that the verdict is contrary to the instructions of the court and unsupported by any evidence in the case upon the essential and material points, that the assignment and chattel mortgage constituted in law, under the undisputed facts proven, one and the same instrument—an assignment by an insolvent debtor."

If we properly understand the position of counsel for plaintiff in error in treating of this phase of the case, aside from any question of actual or intentional fraud, it is that in law the assignment and mortgage must be treated as one instrument, the making of both the same transaction. That the position of defendant in error must be the same as it would have been had the preference been given her debt in the body of the general assignment. This being

the case, the abandonment of the assignment by all parties, which in effect rendered it ineffectual and void, is likewise an abandonment of the mortgage. Or, in other words, the going down of the assignment carried with it all its parts, of which the mortgage was one, and therefore both the assignment and mortgage should be treated as if never made. Assuming the premises to be correct, the conclusion would perhaps follow. The question of the validity of the mortgage is one consisting of law and fact. If the mortgage is so connected with the assignment as to become in law a part of the transaction, and does not extend to a distinct special transfer of property in payment or security of some particular debt, it must be held to be a part of the assignment. Burrill on Assignments, § 167. Otherwise not. The special finding of the jury being, as we think, supported by the evidence, should, in our opinion, be taken as final so far as it goes. Grouping the several interrogatories and answers of this special verdict together it is found that Chambers had not, prior to the making of the mortgage, determined to make the general assignment. That he had not selected the assignee. That the mortgage was made independent of the assignment and for the purpose of securing defendant in error, while the assignment was to secure other creditors as far as possible. The testimony shows beyond any doubt that the indebtedness to defendant in error was *bona fide*. That the mortgage was executed and delivered before any mention of the assignment was made to the agents and attorneys of defendant in error. That the mortgage was accepted and ratified by her as soon as informed of its execution, and that she took possession of the goods, advertised them, and began the sale before they were seized by plaintiff in error. No proof of the alleged conspiracy is made. No instructions were given the assignee by the attorneys for defendant in error. Nor is anything proven which tends to show that the assignee sought to consult

the wishes or inclinations of Chambers. The attorneys consulted by him were those of other creditors, and when told by them that the mortgagee was entitled to the possession of the goods, and when he ascertained that the acceptance of and carrying out the trust imposed by the assignment would be productive of expense and trouble with no adequate returns to him or the creditors, he simply declined to qualify or proceed further. The mortgagee was in possession of the mortgaged property, and her right thereto was unimpeachable.

In *Nelson v. Gary*, 15 Neb., 531, it was decided by this court that the act of 1877 does not prevent a debtor, though in failing circumstances, from preferring a creditor by a separate and independent conveyance, unconnected with the transaction of making the assignment, and the fact that such preference was made the same day of the execution of the assignment, if done without fraudulent intent, would not render it a part of the assignment, so as to convey the mortgaged property in trust for creditor.

It can serve no good purpose to review all the testimony upon the point here discussed. It can be briefly and fairly stated by saying that in the forenoon of the day on which the instruments were made, Chambers met Mr. Harwood at the capitol in Lincoln, stated to him that some of his creditors were pressing him, and that he desired to secure defendant in error; that she had requested him to employ counsel if necessary, and secure the claim; and he wanted to know of Mr. Harwood how it could be done. Mr. Harwood told him the best way would be to make a mortgage. After some further conversation they separated, Mr. Harwood saying he or his partner, Mr. Ames, would be at the office about noon, or soon thereafter. Mr. Harwood saw Mr. Ames soon after, and stated to him that one of them would have to go to the office for the purpose named. Harwood soon after went to the office. No one was there, but Chambers soon afterward came in and desired the mortgage

made. The notes, the payment of which was to be secured, were at a bank in the city. Harwood requested Chambers to go for them, which he did. The mortgage was prepared and signed, but not acknowledged—and taken possession of by Harwood, and afterwards, perhaps, acknowledged. Mr. Ames came in and soon asked Chambers if he wanted a mortgage made, when he was informed by Harwood that the mortgage had been written. Chambers then said he wanted an assignment drawn too. Harwood expressed surprise and asked him what he wanted an assignment for. Mr. Ames asked him if he had any property left to assign, and he said he had—that his store inventoried \$8,500 in January. Mr. Ames got some paper and began writing the assignment, and Mr. Harwood had the mortgage acknowledged and went out, taking it to the office of the county clerk and causing it to be filed. During the afternoon the assignment was prepared and delivered to Mr. Boggs, the assignee. Mr. Harwood caused a telegram to be sent to defendant in error, at Vicksburg, notifying her of what he had done. The testimony wholly fails to show any connection between the execution of the mortgage and assignment, except that they were prepared by different members of the same firm of attorneys, and at nearly the same time. Harwood and Ames, at the time of accepting the mortgage, knew nothing of any purpose on the part of Chambers, if any existed, to make an assignment. The jury were justified in returning the answer to the eighth interrogatory, that the mortgage and assignment were made “by the same firm, but not under the same retainer or employment.” The matter of the assignment had been mentioned between Chambers and Boggs but no definite or final arrangement had been made. We think the mortgage should stand; especially so, since the contest is between the mortgagee and another creditor, who seeks the same preference, and not between the mortgagee and the assignee. *Dodd v. Hills*, 21 Kas., 707. *Farwell v. Jones*, 19 N. W. Rep., 241.

It is contended that the court erred in modifying certain instructions to the jury asked by plaintiff in error, and in giving certain instructions asked by defendant in error, and in refusing to give certain instructions asked by plaintiff in error. But we think the foregoing disposes of all the questions presented by these alleged errors, and nothing could be gained by any extended discussion of them here.

The position assumed by plaintiff in error as to the construction of the pleadings is not tenable. While it may or may not be true that the petition of defendant in error, standing alone, would not authorize her recovery by proving the execution and delivery of the mortgage, followed by her possession of the mortgaged property (which it is not necessary here to decide), it is quite clear that under the issues presented by the answer and reply, by which it was alleged on the part of plaintiff in error, and admitted by defendant in error, that her sole claim grew out of the mortgage and her possession, and with reference to which the cause was tried, the case was properly presented to the jury and the court did not err in refusing to instruct the jury that they must find for plaintiff in error because the proofs did not sustain the allegations of the petition. We will not try to harmonize the general denial with the other allegations of the answer, but will only say that it must be quite difficult to deny a proposition and admit its truth in the same verified pleading. The denial must yield to the admission.

Many exceptions to the ruling of the trial court in the admission and rejection of testimony were taken on the trial, and they are here presented for review. Some of them were evidently taken for prudential reasons and from motives of caution, and will not be here noticed. Others will be noticed briefly.

It is contended that the court erred in excluding certain testimony offered by plaintiff in error for the purpose of showing that defendant in error had, by legal process, re-

taken a part of the goods described in the petition, and that they were then in her possession. In this the court did not err. It is not necessary for us to enquire whether or not there was any merit in the proposed testimony. It is enough to say that no such issue was tendered by the pleadings. Upon the contrary, the plaintiff in error, by his answer, specifically admits the seizure and sale of the goods described in the petition.

It is next contended that the court erred in overruling the objection of plaintiff in error to certain testimony given by the witness Oppenheimer tending to show that the property sold by plaintiff in error did not sell for its value. The witness was introduced by defendant in error for the purpose of proving by him the actual value of the goods when seized by plaintiff in error, he having been one of the appraisers called by him. The examination-in-chief was directed to that point, and of which no complaint is made. Upon the cross-examination plaintiff in error sought to prove by the witness that he was present at the sale and that the property was well sold, that they brought more than the appraised value, that some of them were bought by the witness, and that the proceeds were near \$2,200. Upon re-examination, the witness was asked what articles he bought, what he paid, and what the goods bought were worth. This testimony, in view of the cross-examination, was competent. The evident purpose of the cross-examination was to show that the estimate of the witness as to the value of the goods was too high; that they were well sold, and only brought about one-half the estimate of their value by him.

While the application of the whole testimony was somewhat remote, yet it tended in some degree to aid the jury in arriving at the degree of weight to which the testimony of the witness was entitled when giving his general estimate of the value of the whole stock. Had this inquiry not been entered upon by plaintiff in error there would have been no occasion for it by the other party.

From a careful review of the whole case we are satisfied that the mortgage was made in good faith, to secure a *bona fide* pre-existing debt; that it was independent of, and constituted no part of the general assignment; that possession of the mortgaged property was taken by the mortgagee before the seizure by plaintiff in error, and that he had full notice of all her rights; that his seizure was wrongful; that the verdict and judgment were correct, and that no such errors occurred upon the trial as will call for a reversal of the judgment.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	280
32	802
17	280
54	133

FREDERICK C. FESTNER, PLAINTIFF IN ERROR, V. THE
OMAHA & SOUTHWESTERN RAILROAD, DEFENDANT
IN ERROR.

1. **Verdict Sustained.** On the facts proved, *Held*, That the verdict is sustained by a preponderance of the evidence.
2. **Argument of Attorney.** An attorney will not be permitted in the argument of a case to the jury to make assertions or insinuations of the existence of facts not in evidence. If he do so the verdict may be set aside; but to authorize the setting aside of the verdict the statements must have been of such a character as may reasonably be supposed to have influenced the jury.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

A. C. Wakeley and A. N. Ferguson, for plaintiff in error.

C. J. Greene, for defendant in error.

MAXWELL, J.

In January, 1882, the plaintiff was the owner of lots 7 and 8 in block 154, in the city of Omaha. There was a dwelling-house on lot 7, in which the plaintiff with his family resided. At that time the defendant instituted proceedings in condemnation of right of way and for depot grounds. Commissioners were appointed, damages assessed, and the property condemned. From the assessment of damages thus made the plaintiff appealed to the district court, where the jury rendered a verdict in his favor for the sum of \$5,250. The plaintiff now brings the cause into this court on error.

The errors relied upon will be considered in their order. *First*, "Error in the assessment of the amount of recovery."

One James F. Morton, a witness called by the plaintiff, testified that lot 8 was worth from \$800 and not to exceed \$1,000, and that lot 7 was worth at least \$3,000. Byron Reed placed the value of lot 8 at from \$1,000 to \$1,200, and lot 7 at \$2,500, without the improvements. M. G. McKoon, whose deposition was taken in California, testified that the value of lot 7 was \$2,500 to \$2,600, and lot 8 was \$800. Other witnesses testified on behalf of the plaintiff, but none of them estimated the value of the lots in question as high as those named above.

On the behalf of the defendant, I. S. Hascall testified that the value of lot 8 was about \$600, and lot 7 from \$1,400 to \$1,500. George Smith, county surveyor of Douglas county, testified that the value of lot 7, without the improvements thereon, was \$1,200, and lot 8 \$400. Six other witnesses testified to substantially the same values as Smith.

The plaintiff, after the condemnation proceedings, seems to have purchased the house on lot 7, and removed the same to other lots where it was repaired and made suitable

for a house. A number of witnesses testified to the value of this house, some of whom had not seen it until after removed. They estimated the value at from \$4,380 to \$5,360. Benjamin A. Fowler, an architect, called by the plaintiff, estimated the value, "exclusive of the basement," at \$3,400. He afterwards stated that it probably was worth five per cent less in January, 1882. George Smith, above referred to, who was one of the original appraisers, testified to the condition of the premises and the character of the improvements when the condemnation took place. He states (page 44 of record): "We took the dimensions of all the houses upon all the grounds in the manner by which we arrived at the valuation. We made an estimate of the amount of material in it by its dimensions, and estimated both the material and about what labor had entered into that building and all other buildings of any kind on the ground." * * * *

Q. What, in your judgment, was the value of that house as it stood; of the veneered house at that time?

A. I put it at about \$2,800 to-day.

In this he is sustained by other witnesses, and in our view a preponderance of the testimony fixes the value of the improvements, including the house, at not far from \$3,000, and of the lots at about \$2,000. As the verdict was for a sum in excess of the aggregate of these sums, the first assignment of error is not well taken.

Second. During the argument of the cause to the jury the attorney for the defendant said: "Had I been permitted under the rules of evidence, we could have shown that the company not only made him liberal offers, but had in fact sold to plaintiff for the small sum of five hundred dollars this dwelling which they had paid thirty-two hundred dollars for." The record recites that "at this point the plaintiff's counsel excepted to the above remark of said Green, and requested the court to have the words taken down, for the reason that the evidence offered

in that regard was ruled out by the court. The court instructed Mr. Green not to go outside of the evidence in the argument, and that the evidence tendered in that regard was refused, and that the jury had no right to consider it, and the counsel no right to comment upon it, and the counsel, Green, refrained from further comment upon that matter."

The testimony shows that the plaintiff had become possessed of the house in question from the railroad company, but the price paid for it was properly excluded. An attorney in his argument to the jury must confine his statements to the facts proved. He cannot be permitted even inferentially to assert a fact bearing upon the case which there is no testimony to sustain. Within the limits of the testimony the right of argument, illustration, and comment is free; but he has no right and he should not be permitted to make assertions not warranted by the testimony.

As was said in *Cleveland Paper Co. v. Banks*, 15 Neb., 22: "The rights of parties are to be determined from the evidence, and an attorney in arguing a case to a jury must confine the discussion of facts to those proved. If he can be permitted to make assertions of facts or insinuations of the existence of facts not supported by the proof, there is danger that the jury will lose sight of the issue or be influenced by the misstatement to the prejudice of the other party." In that case the question at issue was the individual liability of the defendant upon a certain alleged contract for paper furnished to a printing corporation of which he was president; yet his attorneys persistently offered to prove that the secretary of the corporation had embezzled its funds, leaving the inference that the paper purchased had come into his hands and been appropriated. This testimony was ruled out, yet on the argument the substance of it was stated to the jury. That the statement was prejudicial in that case we have no doubt, and where such is the case the party will not be permitted to profit

by his breach of duty, but the verdict will be set aside. To authorize the setting aside of the verdict, however, the words spoken must be of such a character as may reasonably be supposed to have influenced the jury. The words spoken in this case do not appear to have had that effect. While the statement was highly improper, yet the jury evidently well knew that the price which the plaintiff paid the railroad company for the house had nothing to do with the case. The trial judge evidently did not consider them of so prejudicial a character as to affect the verdict, and the verdict itself is evidence that they did not have that effect. It is apparent that substantial justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JAMES H. CLARK, PLAINTIFF IN ERROR, v. ROBERT GELL, DEFENDANT IN ERROR.

1. **Bill of Exceptions: ALTERATION AFTER SIGNING.** Where a motion supported by affidavit is filed to strike the bill of exception from the record, upon the ground that it has been mutilated by adding certain words thereto since being signed, the motion will be overruled unless it is made to appear that the mutilation was made by the plaintiff in error or his attorney.
2. **Verdict Against Evidence.** Where a verdict is against the clear weight of evidence so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

W. F. Stone and Hastings & McGintie, for plaintiff in error.

Bagley & Bemis, for defendant in error.

MAXWELL, J.

This action was brought upon a promissory note executed by the defendant to the plaintiff, for the sum of \$120. The defendant in his answer admits the execution of the note but alleges that it was given for a horse sold by the plaintiff to the defendant, which the plaintiff warranted to be sound in every respect, when in fact the horse was unsound and of no value whatever. On the trial of the cause the jury found for the defendant, and a motion for a new trial having been overruled, the action was dismissed.

The attorneys for the defendant have filed a motion in this court, supported by an affidavit, to strike the bill of exceptions from the record, upon the ground that it has been mutilated by writing the words "plaintiff excepts" after certain instructions given and refused. There is no claim or charge that the plaintiff or his attorneys caused the insertion of the words complained of, nor are the circumstances of such a character as to show that the act must have been done by one of them. This court has no right or desire to assume any fact reflecting upon the conduct of an attorney, and will visit no penalties upon him unless it is clearly proved that he has transgressed. The motion must therefore be overruled, but the exceptions will not be considered.

2. The testimony shows that the defendant purchased a stallion from the plaintiff for the sum of \$200, and gave him the note of a third party for \$80; and the note in controversy for the remainder. There is a conflict in the testimony as to whether or not there was a warranty of the horse, but in either case the verdict cannot be sustained.

The defendant in his testimony states that the horse was of but little value. On his direct examination he testifies: "I could not tell just what the value of him would be. I wouldn't take and feed and care for him for him." About a year after the defendant purchased the horse in question he traded him to John A. Legg, whose deposition is in the record. Legg testifies that "Defendant Gell said at the time I bought the horse that the horse was as good a work horse as he ever owned, and that he was as sound as a dollar. This was all the conversation we had in regard to the horse." He also testifies that the horse "was sound of limb, but a little thick winded. It didn't hurt him for a work horse." The defendant, in rebuttal, testifies in regard to the testimony of Legg as follows: "He (Legg) rode up to my place on horseback, and he said he had something to trade with me, and says I, 'That is a pretty good horse you have there,' and he went down to the stable. I never went near his horse, and he says 'I will trade even with you,' and I says, 'I ought to get some boot.' Says I, 'How many mares will you let me breed to him?' And he says, 'Give me the collar and breed a few mares,' and says I, 'All right.'"

There is a clear preponderance of the evidence showing that the horse in question was a good work horse, and was so regarded at or about the time of the trial. This being the case the defendant must comply with his contract. Whenever a verdict is against the clear weight of evidence, so that it cannot be sustained on any principle of right or justice, it is the duty of the court to set it aside. *Fried v. Remington*, 5 Neb., 527. The judgment of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

JOHN O'DONOHUE, PLAINTIFF IN ERROR, V. JACOB R.
HENDRIX, DEFENDANT IN ERROR.

17	287
c45	683
17	287
60	608

1. **Res Adjudicata.** When certain questions presented by the record in a case are decided by the supreme court, and no motion for a re-hearing filed, the court will adhere to such decision in that case at least, if it is a second time brought into the court for review. *Hiatt v. Brooks*, ante p. 33.
2. **Taxes: FORECLOSURE OF TAX LIEN.** Where a decree for a lien for taxes upon two tracts of land was general as to both, and not upon each tract, *Held*, That the decree would not therefore be reversed, but apportioned on the several tracts in proportion to the amount of taxes due thereon.

ERROR to the district court of Sarpy county. Tried below before SAVAGE, J.

Redick & Redick, for plaintiff in error.

Congdon, Clarkson & Hunt, for defendant in error.

MAXWELL, J.

This case was before the court in 1882, and is reported in 13 Neb., 257, the judgment of the court below being reversed and the cause remanded with directions to enter a decree in conformity to the opinion. The court below thereupon rendered a decree as directed, and the plaintiff in error again brings the cause into this court. The errors assigned are: 1st. That the court had no jurisdiction of the action. 2d. That the real estate in controversy consists of two separate tracts, yet the court below decreed a lien for the entire amount against both tracts. 3d. That the action is barred by the statute of limitations. The first and third objections were considered on the former hearing and decided against the plaintiff. No motion for a rehearing was filed, nor was any objection made to the decision

of the court. Those questions therefore will not now be again considered. *Hiatt v. Brooks*, ante page 33.

An examination of the decree shows that the second objection is well taken. The decree will not therefore be reversed, however, but will be modified. The cause is hereby referred to the clerk of this court to ascertain upon notice to the parties the amount justly due upon each tract and report the same to the court, when a proper decree will be entered.

JUDGMENT ACCORDINGLY.

THE other judges concur.

ORVILLE J. COMSTOCK ET AL., PLAINTIFFS IN ERROR, v.
JOHN MICHAEL, DEFENDANT IN ERROR.

1. **Pleading:** PETITION. The petition substantially set out in the opinion, *Held*, To state cause of action.
2. ———: DOUBLE ASPECT. The petition though primarily framed for the purpose of a judgment *quia timet*, yet, *Held*, Sufficient to sustain judgment of foreclosure.
3. **Mortgage:** PURCHASE OF OUTSTANDING TITLE. A mortgagee in possession before foreclosure, buying or paying off an outstanding lien for the purpose of protecting his possession, shall have what he has paid with legal interest and no more.
4. ———: RENTS AND PROFITS. A mortgagee in possession of productive real property before foreclosure, *Held*, Liable for net rents and profits.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Harwood, Ames & Kelly, for plaintiffs in error.

Lamb, Ricketts & Wilson, for defendant in error.

17	288
33	332
17	288
41	880
17	288
49	87

COBB, CH. J.

The plaintiff in the court below, defendant in error, alleged in his petition that on and prior to the 23d day of September, 1872, the defendant, Orville J. Comstock, was the owner in fee of the following described real estate, situate in the county of Lancaster, to-wit: the north half of the north-east quarter of section twenty, in township nine north, of range seven east of the sixth principal meridian. That on said last mentioned day, the said defendant being then indebted to the plaintiff in the sum of two hundred and forty-eight dollars, conveyed the said premises by trust deed to L. W. Billingsley in trust for the faithful payment of said indebtedness within one year from the above mentioned date, together with interest thereon at the rate of twelve per cent per annum. That it was expressly provided in said deed of trust that upon the payment of said indebtedness the said Billingsley, or his successor therein designated, should reconvey the said premises to the said defendant, or his heirs, or assigns. That it was in said deed of trust further stipulated by and between the parties to the said indenture, that the title, both legal and equitable, and all right of possession and equity of redemption in and to all of the said property therein conveyed, should be in the said Billingsley, or his successor therein designated, and the quiet and peaceable enjoyment to them, the said defendant forever warranted to defend against all claims whatsoever. That it was in said trust deed further stipulated that upon the failure of the said defendant to pay said indebtedness within the time above specified, and at the request of the said plaintiff, the said Billingsley was authorized to sell said premises to the highest cash bidder at the door of the post-office in the town of Lincoln, Nebraska, after giving thirty days' notice of the time, terms, and place of sale, and the property to be sold, by advertisement in some newspaper printed and published in said

Lancaster county, and upon such sale to execute and deliver to the purchaser, good and sufficient deeds to such property in fee simple, and that the said deed, wherein a recital of the request of the said plaintiff, or his executor, administrator, or assigns, or of the holders of the note given for said indebtedness, that they should proceed to sell, of the publication of said notice, and in case of the sale by the sheriff of said county of the happening of either or any of the events making him the successor in said trust, shall be received in all courts of law and equity to all intents and purposes as full, sufficient, and conclusive proof, and shall convey a clear and indefeasible estate of inheritance to the purchaser thereof, both at law and in equity, and that the said Billingsley or his successor should apply the proceeds arising from said sale in the manner following, that is to say: *First*, They shall pay the expenses of executing this trust, including twenty-five dollars compensation to said trustees or said sheriff for their or his services. *Second*, Any amount or amounts paid by said plaintiff or his assignees or indorsers on account of taxes on the said premises, with interest at twelve per cent per annum thereon. *Third*, All amounts remaining unpaid upon said note, and all interest upon said note at twelve per cent after due up to date of sale, and the remainder or surplus, if any, shall be paid over to said defendant Comstock or his legal representatives. And that it was further in said deed of trust stipulated that all actions or suits in any manner issuing out of the execution of said trust, except by purchasers under it or cases of gross fraud undiscovered between any of the parties to said trust deed or their privies, shall be only brought within one year after the day of the sale of said premises under the said trust, and at no time thereafter. *Fourth*, And that the deed of said trustee to the purchaser at such sale should transfer and convey to such purchaser all the right, title, and estate and interest of the said defendant Comstock in and to the said premises.

That said trust deed was on the 23d day of September, 1872, duly filed for record in the office of the county clerk of said Lancaster county, and is of record in said office; that said defendant wholly failed to pay said indebtedness as provided in said trust deed, and that after the same became due and payable, said plaintiff requested and demanded that said trustee proceed to sell said premises according to the terms of said trust deed, and that thereupon the said trustee, after having advertised the time and place of said sale and the property to be sold, as in said trust deed directed, did on the 3d day of September, 1874, at the door of the said post-office, offer for sale to the highest cash bidder the said premises, under and by virtue of the provision in said trust deed contained. And said trustee adjourned said sale for want of bidders until the 31st day of October, 1874; that on said 31st day of October, 1874, after thirty days' notice had been given as provided in said trust deed, under and by virtue of the power in said trust deed contained, and in pursuance thereof, and in the manner therein prescribed, the said trustee sold the said premises for the sum of two hundred and twenty-five dollars to the said John Michael, he being the highest bidder therefor.

And that thereafter, on the said 31st day of October, 1874, the said trustee, under and by virtue of the power in said trust deed contained, and in pursuance thereof, made, executed, and delivered to said plaintiff a deed of conveyance conveying to said plaintiff all the right, title, and interest of the said defendant, Comstock, both at law and in equity, in and to the said premises, which deed was on the 20th day of June, 1876, duly filed in the office of the county clerk of said Lancaster county, and is now of record in said office. That said sale was made with the knowledge and consent of the said defendant, Comstock, who fully ratified and confirmed the same; and that the said trustee, with the knowledge and consent of the said

Comstock, put the plaintiff in the possession of the said premises, and that since the 16th day of December, 1874, the plaintiff has been in continuous, peaceable, and notorious possession of said premises, with the knowledge and consent of the said defendant, Comstock.

That no proceedings at law had been had or taken for the collection of the debt secured by the said deed of trust or any part thereof, and that neither the whole nor any part thereof had been collected or paid.

The said plaintiff also claimed in his petition that after the execution and recording of the said deed of trust, the said defendant being indebted to one C. C. Burr for the sum of \$125.00, payable on the ... day of, 187., with interest at the rate of 12 per cent per annum, executed and delivered to the said Burr a mortgage on the same land covered by the said deed of trust, to-wit: the north half of the north-east quarter of section twenty, in township nine north, of range seven east of the sixth principal meridian, for the purpose of securing the payment of the said note and interest, which mortgage was duly recorded in the proper county, etc. That on the day of, 1882, for the purpose of protecting his title acquired by the said deed of trust, plaintiff bought in said mortgage, which was then long past due and wholly unpaid, for a valuable consideration; and that on the day of, 1882, the said C. C. Burr, for the consideration aforesaid, assigned and delivered the said note and mortgage to the plaintiff. Plaintiff also alleged in his said petition that said premises were in the year 1870 subject to taxation, and were in said year duly assessed, and that the taxes of said year were duly levied thereon; that said taxes become delinquent and remained unpaid; and that on the 5th day of September, 1871, the treasurer of said county sold said premises for delinquent taxes of said year 1870 to Charles Cadwallader, for the sum of \$15.50. That said Cadwallader sold the certificate of sal-

thereof to I. M. Riddell; that said Riddell took out a tax deed of said premises on said certificate, which deed was duly recorded; and that on the 25th day of May, 1876, the plaintiff, for the purpose of protecting his title to said premises, bought the same from the said Riddell and received a quit-claim deed from him therefor.

Plaintiff also further alleged in his said petition that on the 19th day of March, 1872, said defendant was indebted to Godfrey & Buckstaff Brothers in the sum of one hundred dollars, for building material sold and delivered to said defendant under a contract with him, and used by him in the construction of buildings on the said land; that said Godfrey & Buckstaff Brothers took such steps that they became and were entitled to a lien upon the said tract of land for the value of the building material so furnished to the defendant as aforesaid; and that on the day of, 187..., the said plaintiff, to protect his title to said premises, and to prevent the same from being sold under said mechanic's lien, paid off the same, and paid said Godfrey & Buckstaff Brothers the sum of one hundred dollars and interest thereon, at the rate of ten per cent per annum from the 9th day of March, 1872.

Plaintiff further alleged that while in the actual and peaceable possession of said land he paid the taxes thereon for the years and at the dates and the sums following, to-wit:

Aug. 2, 1876, tax of 1875.....	\$14 86
Nov. 3, 1877, " 1876.....	15 74
Oct. 30, 1878, " 1877.....	16 95
Oct. 28, 1879, " 1878.....	11 76
Nov. 20, 1880, " 1879.....	10 02
Oct. 1, 1881, " 1880.....	8 01
Aug. 9, 1882, " 1881.....	13 53

Amounting in all to the sum of.....\$90 87

And the plaintiff further alleges in and by his said petition that the defendant, Walter Thurman, claims some interest in said premises by virtue of an attachment levied upon the pretended interest of the defendant Comstock therein; and that the said Comstock still claims some interest in the said premises.

The said petition closes with a prayer that the title to the said premises may be decreed to be quieted in him, the said plaintiff, and that the defendants, Orville J. Comstock and Walter Thurman, and all others claiming under them, be forever foreclosed and barred of all right, title, and interest in and to said premises; also for general relief, and if the court should find that the legal title still remains in the said Comstock, the plaintiff prays that his said mortgage may be foreclosed and said premises sold.

The defendant moved to strike out of the said petition certain parts thereof as containing immaterial, irrelevant, and redundant matter. But it is impossible to readily ascertain the particular parts of the petition intended by the motion, the same being designated as "beginning with the words: 'and plaintiff further says' on the fourth line from the bottom of the second page of said pleading," etc. The following words are also found in the transcript: "(Note.) The portions of the petition referred to in above motion will be found marked with red ink brackets, Clk. D. C." But the pagings and alignments of the original are not retained in the transcript sent to this court, nor are there any red ink brackets.

The attention of the bar is again called to the necessity on the part of counsel of examining the records sent to this court before submitting them.

The above motion was overruled, but for the reason above stated I express no opinion upon such ruling, being unable to identify the portion of the petition sought to be stricken out.

The answer of the defendant, Walter Thurman, was then

Comstock v. Michael.

filed, in which he alleged the ownership of the defendant Comstock in the said premises; and by way of counter-claim or cross petition set up and alleged that at the May, 1883, term of said court, in a certain cause then pending in said court wherein said answering defendant was plaintiff and said Comstock was defendant, and in which an order of attachment had been duly issued and duly levied on said lands, he, as plaintiff therein, by the consideration of said court, duly recovered a judgment against said Comstock for the sum of \$68.96 debt, and \$6.65 costs of suit; that said attachment still being in full force, an order was duly made and entered in said cause that said lands be regularly appraised, advertised, and sold for the satisfaction of said judgment, which said judgment and order still remained in full force, unreversed and unappealed from, with prayer, etc.

The said defendant Comstock then applied to the court for an order to compel the plaintiff to separately state and number his several causes of action, which order was denied.

The defendant Comstock then filed his answer to the said petition, in and by which he admitted that prior to the twenty-third day of September, 1872, he was the owner in fee of the said real estate, and that on said day he executed and delivered the trust deed or mortgage on said premises in said petition described, conditioned for the payment by the defendant to the plaintiff of the sum in said petition stated at the expiration of one year from said date, with interest, as in said petition alleged; but he denied that he was at that or any other time indebted to the said plaintiff in the sum of \$248, or in any sum other or greater than the sum of two hundred dollars, which latter sum was the true and sole consideration for said mortgage or trust deed; and that the remainder of said sum of two hundred and forty-eight dollars, to-wit: the sum of forty eight dollars, was taken and reserved by said plaintiff and contracted to be paid to him by said defendant unlawfully and corruptly,

for the sole, unlawful, and corrupt purpose of paying and securing to said plaintiff of a greater rate of interest than twelve per cent per annum, to-wit: about forty per cent per annum, for the loan and forbearance of said sum of two hundred dollars at that time loaned to this defendant by said plaintiff.

The said defendant also admitted the execution and delivery by him to the said C. C. Burr of the mortgage described in the said petition, also that said Burr assigned and delivered the same to said plaintiff, but averred that the sole and only consideration paid by the plaintiff to the said Burr for said assignment and transfer was the sum of forty dollars. And defendant denied that no action or proceeding has been begun at law for the collection of the indebtedness secured by said mortgage, but averred that a note given to secure said indebtedness was by said Burr sued at law in the county or district court of Douglas county in this state; and that a judgment has been rendered in said suit, and that more than five years had elapsed at the time of the commencement of this action since any execution had issued on said judgment. And said defendant denied that said land was ever lawfully assessed for taxation, and denied that any taxes were ever lawfully levied thereon; and denied each and every allegation in said petition contained not in said answer expressly admitted.

The said plaintiff thereupon filed two several replies, denying each and every allegation in the several answers of the defendants Thurman and Comstock.

There was a trial to the court, a jury having been waived by the several parties to said cause. Whereupon, the court found the legal title to the real estate described in the plaintiff's petition to be in the defendant, Orville J. Comstock; that on the 23d day of September, 1872 the said Comstock, in consideration of two hundred and forty-eight dollars, executed and delivered to the plaintiff the trust deed mentioned in the said petition; that at the date, and for the

consideration in said petition set out and alleged, the said defendant executed and delivered to the said C. C. Burr the mortgage described in the said petition; that before the commencement of this action, the said C. C. Burr, for a valuable consideration, assigned the said debt and mortgage to the plaintiff; that on the 19th day of March, 1872, Godfrey & Buckstaff Bros. obtained a valid mechanic's lien on the premises described in the petition against the defendant Comstock for the sum of one hundred dollars, and that afterwards and to protect his security the plaintiff paid off the said sum of one hundred dollars; that in order to protect his said security, the said plaintiff has paid the taxes on the said premises for the years 1870, 1875, 1876, 1877, 1878, 1879, 1880, and 1881.

The court further found that there was at the date of said finding due the said plaintiff from the defendant Comstock the sum of one thousand two hundred and sixty-one dollars and five cents, as follows, to-wit: On the trust deed, five hundred and seventy-five dollars and thirty-six cents; on the Burr mortgage, two hundred and ninety-five dollars; on the mechanic's lien, two hundred and three dollars and sixteen cents; and for taxes paid, the sum of one hundred and eighty-seven dollars and fifty-three cents.

The court thereupon adjudged and decreed that the said plaintiff have a first and valid lien on the said premises in the petition described for the sum of one thousand two hundred and sixty-one dollars and five cents; that one thousand and fifty-seven dollars and eighty-nine cents of the said sum shall draw interest at the rate of twelve per cent per annum until paid, and that two hundred and three dollars and sixteen cents of said sum shall draw interest at the rate of seven per cent per annum until paid.

The court further found that the defendant, Walter Thurman, had a valid and second lien on the said premises for the sum of one hundred and six dollars and fifty cents, with interest at twelve per cent per annum until paid,

by virtue of the proceedings set up in his answer herein, and made an order of sale and distribution accordingly.

There was a motion for a new trial by both defendants, which was overruled, and the cause brought to this court on error.

There are six errors assigned, which will be considered in their order.

1. "In permitting the introduction of any evidence under the petition on behalf of the plaintiff over the objection of the defendants, that the same does not state facts to constitute a cause of action."

I do not think there can be a doubt that the petition states a cause of action. But it must be admitted to be a question of some difficulty whether the cause of action stated constitutes a sufficient foundation for the judgment rendered. My individual opinion was that it did not, but the majority of the court being of the opinion that it does, I yield.

There is, doubtless, a recognized theory of equity pleading by which the pleader states his facts sufficiently broad and comprehensive to sustain one of two alternative judgments or decrees, as may be held by the court to be appropriate or applicable. There can be no doubt that a deed of trust can be foreclosed the same as an ordinary mortgage, and although the plaintiff had at one time adopted and sought to pursue an unwarranted and inadmissible remedy, yet it cannot be said that he thereby forfeited his right, while yet in the *locus penitentiae*, to turn back and enter upon the true course. And as to the effect of whatever he did while in pursuit of the false method, while we must hold that he gained nothing by such proceedings, we must admit that he lost nothing beyond his time, labor, and expenses. If he lost or forfeited nothing by his attempt at a foreclosure out of court, can he be said to lose anything by stating the same in his petition, except to incumber the same with impertinent and redundant matters? Certainly not.

2. "Because of error in the assessment of the plaintiff's recovery. 1. In allowing the recovery of interest on the principal sum secured by the plaintiff's trust deed, and in determining said principal to be more than two hundred dollars. 2. In allowing the plaintiff to recover more than seventy-five dollars on account of the mortgage purchased by him of C. C. Burr, that being the amount paid by him therefor, and in allowing recovery therefor the note which the same was given to secure, being barred by the statute of limitations, and having been merged in a judgment which at the beginning of the action was dormant and barred by the statute of limitations, and therefore at the time of its purchase by plaintiff no lien on the premises. 3. In allowing the plaintiff any sum for the mechanic's lien pleaded in his petition, the same being barred by the statute of limitations and being shown by the testimony to have been paid by the defendant Comstock."

A thorough examination and consideration of the evidence in the case led us all to the conclusion that two hundred dollars only was loaned by the plaintiff to defendant, Comstock, and constituted the sole consideration for the trust deed for two hundred and forty-eight dollars; that the said contract was therefore usurious; and that consequently the allowance of more than two hundred dollars without interest thereon was, under the pleadings and proofs in the case, erroneous.

As to the Burr mortgage, it was not barred by the statute of limitations, the same not having run ten years. It makes no difference what unsuccessful efforts had been made to collect the note, it had not been collected and the note and mortgage taken together constituted a lien on the land. The plaintiff, according to his own allegations, was in possession of the land when he bought in this lien. It was therefore his privilege, if not his duty, to buy it in, for the purpose of protecting his interest and possession; but it was not his privilege to buy it in at a discount, and either

hold it at interest at its face value as an incumbrance on the land, or even to charge it up at its face value as an accretion to the lien which he already held on the land. The relation between a mortgagee in possession and his mortgagor is much like that between tenant and landlord, so far as the question which I am now considering is concerned, and in the earliest case heard before this court, *Mattis v. Robinson*, 1 Neb., 3, the court, in the syllabus, say: "A tenant buying in an outstanding title for the purpose of protecting his possession shall have what he has paid and legal interest, and no more." This rule of law, which cannot be doubted, is equally applicable to the purchase of outstanding liens and incumbrances which have not arisen to the dignity of titles. According to the plaintiff's own testimony he paid seventy-five dollars for the Burr mortgagor, and it appears from the assignment itself, as found in the record, that the purchase was made on the 5th day of December, 1882. The plaintiff will therefore be entitled to the sum of the seventy-five dollars with interest thereon at the rate of seven per cent per annum from said 5th day of December, 1882.

There is a pen and ink entry in the bill of exceptions, of which the following is a copy: "It was admitted that the taxes were paid by Michael as alleged in the petition, but the evidence was objected to for irrelevancy and immateriality by the defendants severally; the objection overruled," etc. Doubtless, as we have above stated, the plaintiff while in the possession of the land had the right to pay the taxes, for the protection of his interest, and he is entitled to all sums disbursed for that purpose, together with interest from the date of such disbursement at legal rates. The following are the several sums paid for taxes by the plaintiff, as appears by the petition, together with the amount for which the land was sold for the taxes of the year 1870, which the plaintiff afterwards acquired by assignment, as appears by the bill of exceptions, and the respective dates

from which the plaintiff is entitled to interest on the said several sums:

Sept. 5, 1871	\$15 50
Aug. 20, 1876	14 86
Nov. 3, 1877	15 74
Oct. 30, 1878	16 95
Oct. 28, 1879	11 76
Nov. 20, 1880	10 02
Oct. 1, 1881	8 01
Aug. 9, 1882	13 33

Those of the above items which bear date prior to June 1, 1879, will draw interest from their respective dates at the rate of ten per cent per annum, up to that date, after that date they, as well as those items bearing date subsequent to June 1, 1879, will draw interest at the rate of seven per cent per annum.

The only remaining item of disbursement claimed by plaintiff in his petition to have been made by him while in the possession of the said premises, and for the purpose of protecting his possession and lien, is that of the mechanic's lien. We have carefully examined the record for evidence of the buying in or paying off of this lien, and the only testimony which we are able to find bearing on the point is that of Captain Billingsley in which he says: "It is a great many years ago and my recollection is not very definite, but my recollection is that that lien was paid off by funds received from Mr. Michael, either before or after the trustee's sale, I would not be certain which." The trustee's sale took place, according to the petition, on the 31st day of October, 1874. The mechanic's lien was filed in the clerk's office on the 19th day of March, 1872, and the last item of the account of materials furnished upon which said lien was founded bears date January 2, 1872. So that at the time of said trustee's sale the same had ceased to be a lien on said land for nearly ten months. And if

the plaintiff bought the claim in, or paid it off, at or after said trustee's sale, he only acquired a personal claim against the defendant Comstock, if anything, and not a lien on the said real estate.

3. "Because the finding, decision, and judgment are not sustained by sufficient evidence and are contrary to law."

After what has been said under the second head, it is deemed unnecessary to examine further into the sufficiency of the evidence.

4. "Because of errors of law occurring at the trial," etc.

Attention not being called to errors properly falling under this head by plaintiffs in error in their brief, the subject will not be pursued.

5. "Because the court erred in overruling the defendants' (plaintiffs in error) motion to strike out certain immaterial, irrelevant, and redundant matter," etc.

For reasons stated in the early part of this opinion I am unable to identify the particular portion of the petition referred to in the motion to strike out, and will only say in this connection that, in my view, the granting or denying of a motion to strike irrelevant or redundant matter from pleadings is, under our system of practice, a matter resting largely in the discretion of the trial court; and that to justify the reversal of a judgment for such cause, there must be an abuse of such discretion, at least to the apparent prejudice of the complaining party.

6. "Because the court erred in overruling defendants' (plaintiffs in error) motion to require the plaintiff (defendant in error) to separately state and number his several supposed causes of action in his petition contained," etc.

In my view of the case there is but one cause of action stated in the petition. Neither the Burr mortgage, the payment of taxes, or the mechanic's lien, if paid off by the plaintiff in the manner alleged in the petition, would constitute a separate cause of action in his hands against the defendant Comstock, but could only be added to his main

cause of action as accretions to swell the amount of his recovery. In that view, no purpose of utility or convenience would be subserved by numbering them; and they were already sufficiently separated in their statement.

It appears from the testimony of the plaintiff that while he was in the possession of the mortgaged premises he derived certain rents and profits. These the law requires him to account for and charge himself to against his several items of charge and allowance against the defendant Comstock. The following is the testimony of the plaintiff applicable to this point:

Q. How many years have you rented it?

A. Well, I cannot tell. It must have been eight or ten years.

Q. What would be the average rent a year; eight or ten dollars, or what?

A. It might be eight dollars; I don't think it was hardly that; some years ten, and in the first years I only realized six or seven or eight dollars, until the last year. It would probably average six or seven dollars.

The amount which I find the plaintiff to be chargeable with on this account is seven dollars per year, beginning with the year 1875; the several items to draw interest up to the first day of June, 1879, at the rate of ten per cent per annum, and after said date at the rate of seven per cent per annum.

The findings and judgment of the district court are reversed, and the cause remanded to the district court with directions to enter a final decree in conformity to this opinion.

REVERSED AND REMANDED.

THE other judges concur.

17	304
23	480

17	304
29	190

17	304
35	331

17	304
40	717

**CRIPPEN AND AMICK, PLAINTIFFS IN ERROR, V. OBE
CHURCH, DEFENDANT IN ERROR.**

Justice of Peace: APPEARANCE: SETTING ASIDE JUDGMENT.

A defendant in a case before a justice of the peace who has appeared at the return day of the summons or attended at the time to which a trial has been adjourned, will not be entitled to have the judgment against him set aside as provided in section 1001 of the civil code.

ERROR to the district court for Cass county. Tried below before POUND J.

J. H. Haldeman, for plaintiffs in error.

Travis & Clark, for defendant in error.

COBB, CH. J.

This action was commenced before a justice of the peace. Personal service of the summons was had on the defendant, returnable on the 19th day of July, 1884, at 10 o'clock A.M. On the return day of the summons at the hour set for trial, both parties appeared, and by mutual agreement of the parties, by their respective attorneys, the case was continued to July 21, 1884, at 9 o'clock A.M. July 21, 1884, at 10 o'clock A.M., the parties appeared and the defendant filed a motion to dissolve an order of attachment which had been issued in the case, which motion was overruled. On motion of the plaintiffs the cause was again continued to July 23, 1884, at 2 o'clock in the afternoon.

On the 23d day of July, 1884, at 2 o'clock in the afternoon, the plaintiffs appeared and the case was called; the defendant did not appear; the justice waited one hour; the defendant not appearing and a jury being waived, the case was submitted to the justice on the bill of particulars of the plaintiffs and evidence, whereupon the justice found

that there was due from the defendant to the plaintiffs the sum of \$52, with interest thereon at the rate of seven per cent per annum from July 10, 1884, and rendered judgment in favor of the plaintiffs and against the defendant, for fifty-two dollars with interest at seven per cent from July 10, 1884, and the costs of the action, taxed at \$9.00. On the 28th day of July, 1884, the defendant appeared before the justice and moved to set aside the said judgment for the reason that the same was rendered in the defendant's absence. The record also contains an entry of judgment (or an offer to confess judgment, it is somewhat difficult to say which, by the defendant) for \$3.40 costs, for the purpose of having the judgment set aside.

There then follows another motion to set aside the judgment for the same reason. Then follows an entry by the justice under date the 29th of July, 1884, of the rendition of judgment against the defendant as by confession, for the costs of the action, in the sum of \$9.00, and a conditional order setting aside the judgment and setting the cause for trial on the 5th day of August, 1884, at 10 o'clock A.M.

Under date of July 31, 1884, there was filed a notice of the plaintiffs' attorney to the defendant's attorney that a motion will be made to correct the record of said justice in the case, which motion was afterwards made (it does not appear when) as follows: "Now come the plaintiffs and move the court to strike the motion for a new trial from the files and correct the record on his docket for the following reason: *First.* The plaintiffs had no notice of the hearing of the motion. *Second.* The entries on the docket made in the absence of the plaintiffs are void and made by mistake. *Third.* The entries made after judgment are a nullity, and without authority of law, and a new trial cannot be granted. *Fourth.* Because the defendant and his counsel acted by fraud and deception in having the fraudulent and void entries made, and deceived the court."

Then comes the following entry by the justice:

"The first, second, and third reasons sustained, the fourth reason not sustained. The plaintiffs filed their motion to strike from the files the motion for a new trial made to set aside judgment, and correct the record herein. The defendant heretofore made an appearance in the action, and is not entitled thereto. And for the further reason that the plaintiffs had no notice as stated in the first reason as the law requires, and that said order was placed on the record by mistake before hearing argument on the motion. Motion sustained."

The cause was then taken to the district court by petition in error, where, upon hearing, the judgment of the justice was reversed, which judgment of the district court is now brought to this court on error.

In the case of *Cleghorn v. Waterman*, 16 Neb., 226, the majority of this court held that "a defendant in a case before a justice of the peace, who has appeared at the return day of the summons, or attended at the time to which a trial has been adjourned, and has made the necessary bill of particulars, will not be entitled to have the judgment against him set aside as provided in section 1001 of the civil code, nor will he be denied the right of appeal."

That is the only real question presented by the record in the case at bar, or which was before the district court. Neither the question of costs nor that of the proceedings before the justice after judgment are properly before this court or were before the district court.

It appears from the justice's transcript that the defendant appeared at the return day of the summons, and also on a subsequent day set for trial, and although he had not filed a bill of particulars, yet, having filed a motion to dissolve an order of attachment he brought himself within the reason of the rule in *Cleghorn v. Waterman*, *supra*, and had not the right to have the judgment set aside as having

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been rendered in his absence, nor would he have been denied the right of an appeal.

The judgment of the district court is reversed, and the proceeding in error in said court dismissed, and the judgment of the justice of the peace is restored and affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JOHN CATTLE, SR., PLAINTIFF IN ERROR, V. M. D. HADDOX ET AL., DEFENDANTS IN ERROR.

17 307
50 655

1. **Usury: COSTS.** In an action on a contract where it is plead that illegal interest has been contracted for or taken or reserved, and the truth of such plea shall be proved or admitted, the defendant is entitled to recover costs.
2. ———: ———. Such recovery will not be confined to the costs made or incurred on question of usury, but will apply to the costs of the action.
3. **COSTS: MOTION TO RE-TAX.** A motion for re-taxation of costs made necessary by mistake, neglect, or omission of the clerk, or irregularity in obtaining a judgment or order, may be made at any time within three years after judgment upon reasonable notice to the adverse party, or his attorney in the action.

ERROR to the district court for Butler county. Heard below before POST, J.

R. S. Norval, for plaintiff in error.

Robberts & Fuller, for defendants in error.

COBB, CH. J.

This cause was in this court in 1883, when the judgment of the district court in favor of the present plaintiff in error was affirmed. The case is reported in 14 Neb., 527. There was no question of costs in that case; but it

appears from the record in the case at bar, that after the affirmance of the judgment in the former case, and at the December term of the district court, 1883, the defendants filed their motion for a re-taxation of the costs in the case, of which motion the following is a copy :

"And now come defendants and move the court to re-tax the costs herein, and for cause of said motion say that on the 16th day of February, 1883, the action was tried upon the issues joined before Geo. G. Bowman as referee. That the third count in defendants' answer set up that the contract upon which the action was brought was usurious. That the referee in his findings found the following facts: 1. That the note upon which this action is brought was for \$445.15. 2. That the consideration for which the note was given, and the actual sum which defendants received was \$383.

"In the conclusions of law as reached by said referee he found:

"1. That the contract for the payment of the said sum of \$445.15 was usurious. That the referee also found that on the 2d day of April, 1880, the defendants paid on said note the sum of \$247.35, and that there was still due the plaintiff the sum of \$135.65, and that plaintiff was entitled to a decree of foreclosure of the mortgage as set out in the petition to secure said note.

"At the May term, A.D. 1883, of this court, the report of the said referee was filed and adopted and confirmed by the court, and judgment and decree ordered.

"That by a mistake or oversight of the clerk of this court, judgment was entered and recorded against the defendants for the said sum of \$135.65 and costs of suit, taxed at \$108.33. That the error or mistake complained of by the defendants is, that the clerk rendered judgment against them for \$108.33 as costs in the case, etc. It further appears that on the 17th day of December, 1883, it being a day of said term of court, the said motion to re-

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tax costs came on for trial to the court, upon the affidavits of C. A. Bemis, C. W. Barkley, and R. S. Norval. * * * And after hearing said motion upon the affidavits aforesaid, and upon said last mentioned date, the court sustained the said motion to re-tax the costs in said case, and thereupon ordered all of said costs to be taxed to the plaintiff, and then and there caused to be entered upon the journal of said court the following order and judgment," etc.

This proceeding is brought to this court on error.

Section 5, of chapter 44 of the Compiled Statutes, provides as follows: "If a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not therefore be void, but if in any action on such contract proof be made that illegal interest has been directly or indirectly contracted for or taken or reserved, the plaintiff shall only recover the principal without interest, and the defendant shall recover costs."

But the plaintiff in his brief says that, "as shown by the record, the question of usury was not contested upon the trial, but usury was expressly and openly admitted, but the case was stubbornly fought *solely* on the question of payment, no witness being called to prove usury. That all the costs were made *solely* on the question of payment." The plaintiff accordingly urges that the costs being made on another branch of the case, and not in establishing or disproving the charge of usury, the provision of the statute above quoted does not apply. I should doubt the propriety of a court entering upon the task of searching out and distinguishing between the items of costs made on one branch or another in any case, but were we disposed to do so it would be impossible in this case, as there is nothing in the record before us to show what items of costs entered into the bill which seems to have been taxed at \$108.33. True there is the affidavit above referred to, in which it is alleged that no witness was examined or testified on the subject of usury.

An examination of the language of the statute above quoted cannot fail to show that it was not the intention of its framers to confine its effect to the costs made in proving on the one hand, and trying to disprove on the other, the charge of usury. The language is, "If, in any action on such contract, proof be made that illegal interest has been

* * * contracted for or taken * * *
the defendants shall recover costs." It will not be denied that the report of the referee brings this case within the terms of the statute, whether there was proof that usury had been contracted to be paid or not. The plaintiff in his brief says that it was admitted, rendering proof unnecessary. This then being an action on one of the class of contracts contemplated by and described in the statute, the defendant by its very letter is entitled to recover costs. This statute fixes no limit to this recovery. We are therefore left to the fee bill and other provisions of statute to ascertain what costs he may be entitled to recover in the action, and he is not confined to the costs arising on any one branch of it.

The plaintiff also makes a point as to the time when the motion upon which this proceeding arose was made in the district court. The proceeding was, as I suppose, brought under the *third* subdivision of section 602, and the first subdivision of section 604 of the civil code. By reference to the last clause of section 609 of the code it will be seen that such proceeding may be had within three years after the defendant has notice of the judgment. In this case the plaintiff or his attorney was entitled to reasonable notice of the motion, which I presume they had, as they appeared and resisted, and no complaint is made in that regard.

The proceedings and order of the district court are affirmed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. THE SCHOOL DISTRICT OF OMAHA, V. THOMAS CUMMINGS.

17	311
20	306
17	311
54	469
17	311
60	420

1. **Mandamus: RIGHT TO MAINTAIN.** Where by law it is made the special duty of the incumbent of a public office to perform certain ministerial duties as such officer, and such duties cannot be legally performed by any other person to the full extent required by law, a writ of mandamus will issue upon the application of any person interested to compel the performance of such ministerial duty.
2. **LIQUORS: WHOLESALE DEALER.** The ordinance of the city of Omaha makes it the duty of the city marshal, on the first day of each and every month, to ascertain and report to the city council the names of all persons or firms engaged in the liquor traffic in said city, giving their place of business, whether licensed or unlicensed, and to notify any unlicensed liquor dealers to at once cease the traffic, and to make complaint against all persons selling liquor without license. *Held*, That the ordinance applies to all persons engaged in the liquor traffic, and it is the duty of the marshal to comply with the requirements of the ordinance without reference to the quantity of liquor sold at each sale by the person engaged in the traffic.
2. ———: ———. The act entitled "An act to regulate the sale of malt, spirituous, and vinous liquors," etc., approved February 28, 1881, Compiled Statutes, chap. 50, commonly known as the "Slocumb" law, applies alike to all persons who are engaged in the sale of malt, spirituous, and vinous liquors. Wholesale dealers are not exempt from its provisions.

ORIGINAL application for mandamus.

H. D. Estabrook and *E. W. Simeral*, for relator.

No appearance for respondent.

REESE, J.

The relator seeks a writ of mandamus to the respondent requiring him to discharge certain ministerial duties imposed upon him by the ordinances of the city of Omaha, of which city he is the marshal.

The sections of the ordinance referred to are sections one and twenty-three, and are as follows:

Section 1. "No person or co-partnership of persons shall, within the limits of the city of Omaha, either by himself or by his or their agent or employe, sell or give away, upon any pretext whatever, any malt, spirituous, or vinous liquors, or any intoxicating drinks without having first complied with the provisions of this ordinance, and obtained a license as herein set forth."

Section 23. "The city marshal shall, on the first day of each and every month, ascertain and report to the city council at its first regular meeting thereof the names of all persons or firms engaged in the liquor traffic, and the place of business of each, and whether licensed or unlicensed, and shall notify any unlicensed liquor dealers to at once cease such traffic, and shall make complaint against all persons selling liquor without license."

It is alleged in the relation that "there are now, and for a long time have been, numerous persons and firms engaged in the liquor traffic in the city of Omaha who have now no license, nor have ever had; nor have they ever made application for such license, but have neglected and refused to do so; but who, notwithstanding, are now, and for a long time have been, selling and otherwise disposing of intoxicating liquors in violation of the laws of the state of Nebraska, and the ordinance herein pleaded."

The first question presented by this case is, whether or not mandamus is the proper remedy? If not, the writ should be denied. It may be said that there is a "plain and adequate remedy in the ordinary course of the law," sec. 646, civil code, and that it is not only the privilege but the duty of every good citizen of Omaha to file the necessary complaint against persons who are violating the laws of the state or the ordinances of the city; and that it is the special duty of the officers of the relator to do so in order to protect the financial

interests of the relator, school district. Without stopping to discuss the question relating to the making of complaints and conducting of prosecutions, it must be noted that there are certain specific official duties required by the ordinance which cannot legally be performed by any person other than the marshal. By the ordinance it is made his duty *as marshal* to ascertain and report to the city council on the first of each and every month the names of all persons engaged in the liquor traffic, the place of business of each, and whether licensed or unlicensed. This, in connection with the notification and complaint, is an official duty, specially imposed upon him by law, and which no one else can legally perform for him. These duties are purely ministerial. No judicial discretion is anywhere involved. The ordinance says he "shall" make the report, and "shall" notify such persons to cease business. In this connection it may be observed that the ordinance is equally explicit as to his duty in the matter of making complaint against offenders.

Section 645 of the civil code is as follows: "The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. But though it may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions it cannot control judicial discretion." The act which is required of the respondent is "an act which the law specially enjoins as a duty resulting from an office." We are wholly unable to see why it is not within the provisions of the law above cited and quoted. Mandamus is evidently the proper remedy. *State v. Gracey*, 11 Nev., 223. *Moses v. Kearney*, 31 Ark., 261. *State v. Doyle*, 40 Wis., 175. Wood on Mandamus, 19 Id., 24. *Moses on Mandamus*, 14. 2 Johnson's Cases, 217, note 1. *Comrs. v. King*, 13 Flor., 460.

The relation shows that a demand has been made upon

State v. Cummings.

respondent requiring the performance of these duties, and that compliance with the demand has been refused by him. The demand and refusal are as follows:

“OMAHA, NEB., January 10, 1885.

“*To Thomas Cummings, Marshal of the City of Omaha:*

“SIR—As attorney for the school district of Omaha, I would respectfully call your attention to the fact that numerous wholesale liquor dealers are selling intoxicating liquors without a license. I would instance the Her Distillery, Metz Brewing Company, Schlitz Milwaukee Beer Company, and others.

“I have advised my clients that such parties, though exclusively wholesale liquor dealers, are amenable to the Slocumb law, and that being so, it is your duty to ascertain the number of such unlicensed dealers, report them to the city council, and make complaint against such as fail to take out license.

“To request you to perform your duty in this behalf is the object of the present notice.

“H. D. ESTABROOK.”

“OMAHA, NEB, January 10, 1885.

“*H. D. Estabrook, Esq., Attorney for the School District of Omaha:*

“DEAR SIR—Your notice of even date was duly received. I have no disposition to neglect the duties of the office which I hold, and were I certain that the wholesale liquor dealers are amenable to the so-called ‘Slocumb law,’ I would not hesitate to notify them to take out licenses, and to complain against them for a failure to do so. But as presently advised, I am of the opinion that wholesale liquor dealers are not intended to be included in the act, and until the matter is otherwise judicially determined, I must decline to either ascertain, report, or complain against such dealers.

“I am very respectfully yours,

“THOMAS CUMMINGS,

“*City Marshal.*”

By the foregoing it will be seen that the city marshal is of the opinion that wholesale liquor dealers are not required to obtain a license, and therefore he refuses to report them as "engaged in liquor traffic." It is conceded by the relator that the failure of respondent to comply with the ordinance above quoted is limited to the class of dealers known as wholesale dealers, and this presents the question as to whether or not wholesale dealers are required to obtain a license under the act of 1881, in order to make their business a legal one. Or, stating it more correctly, whether or not it is the duty of respondent to report such persons to the city council as "persons engaged in the liquor traffic," and to notify them to obtain license, and in case of their failure to do so, enter the necessary complaint.

At this point we are met with the suggestion that this proceeding is only intended to secure a construction of the liquor law of 1881 upon the question of the liability of wholesale dealers to be prosecuted as violators of its provisions, and that, as they are not parties to this action, any decision we may make will have no binding force upon them, and hence, if it should be in favor of the relator the whole question will still be open to litigation by them. This must be conceded, and it must be further conceded that this has been the law in all cases since the organization of courts of justice. Yet courts have not, as a rule, refrained from deciding cases presented to them for decision, simply because the rights or liabilities of others not parties to the action may not be bound by the adjudication of the differences between parties immediately before the court. The question now to be decided is: Is it the duty of the respondent to comply with the provisions of the ordinance, and does that duty include what are termed wholesale dealers?

Section one of the ordinance referred to was evidently passed by the city council for the purpose of carrying out and giving effect to the law of 1881, known as the "Slo-

cumb" law, and our attention must be at once directed to that act. Section eleven of the act, Ch. 50, Compiled Statutes, is as follows: "All persons who shall sell or give away upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall, for each offense, be deemed guilty of a misdemeanor, and upon conviction thereof, shall be fined not less than one hundred dollars nor more than five hundred dollars, or be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bonds and obtained a license as herein provided." The language of this section is sweeping in its nature. No exemptions or qualifications are made. "All persons who shall sell" without a license, is limited to no class of "persons." "All" is defined by Webster to be "every one, or the whole number of; the whole quantity, extent, duration, amount, quality or degree of." Webster's Unab. Dic. Again, "the whole number; every one; every part; whole time; whole extent." Craig's Universal Dictionary.

As there are no exceptions in this section, we next look to the whole act, and in that we find no words of limitation and no exceptions. As decided by this court in *Pleuler v. The State*, 11 Neb., at page 556, the act is strictly a prohibitory law without action by local authorities. No person is authorized to sell liquors unless he obtains that authority from local tribunals. The letter of the act itself furnishes no escape for any person who sells "malt, spirituous, or vinous liquors, or any intoxicating drinks." Section eleven, however, as amended in 1883, exempts from its provisions persons who may desire to sell wine made from grapes grown or raised by themselves on their own land, provided they sell in quantities of not less than one gallon. This amendment can have but little bearing upon the ques-

tion now under consideration, except that it might indicate a legislative interpretation to the extent that such an exemption was necessary without reference to the quantity sold at one time. The prohibition is continued as against them unless they sell in large quantities. In that case it is removed. This is the only discrimination we have been able to find in the act.

But it may be contended that the spirit of the act under consideration is not in harmony with what may be deemed its letter, and that it was the legislative intent that its provisions should only apply to what are familiarly known as saloon keepers. The usual method adopted by courts for ascertaining the legislative intention is by reference to the language adopted by the law maker. By the application of this rule we have seen there is no discrimination between persons who sell liquor. The person who sells forty gallons without a license is not less guilty than the one who sells one gill. It is true that laws have been enacted in many states which are limited in their effects to retail dealers. But in such cases it is clearly so expressed or implied by the acts themselves. Such acts are usually made to apply to keeping "dram shops," "tippling houses," "selling liquor to be drank upon the premises," "selling liquor in less quantity than one gallon," etc., etc. If not expressed in such laws it is clearly to be inferred that they can only refer to retail dealers. But such is not the law of this state, and no such implication can arise. It may be asked if it can be maintained that wholesale dealers are required to procure the certificate of character, execute the bond, give notice of application, and run the risk of being met by remonstrances followed by "hearing," "appeal," etc., the same as the saloon keeper? We answer: Such is the law. As was held in *Pleuler v. The State*, the act is for the purpose of regulating a traffic, "believed by the legislature to be pernicious in its effects upon society." In the eyes of the law the person who would engage in this

318 SUPREME COURT OF NEBRASKA,

B. & M. R. R. Co. v. Saunders County.

"traffic" must take his place among others who are engaged in the same business and procure the license as others do, else he is a criminal as others are.

It is not for the courts to say whether the law is right or wrong, provided it is a constitutional enactment. It is simply their duty to declare the law as they find it.

It is clearly the duty of respondent to report to the council "the names of all persons or firms engaged in the liquor traffic" as required by the ordinance, without regard to the quantity being sold by such person at each sale. If he is "engaged in the traffic" it is enough for the marshal to know to apprise him of his whole duty.

A peremptory writ of mandamus is allowed.

WRIT ALLOWED.

THE other judges concur.

17 318
31 478

THE BURLINGTON & MISSOURI RIVER RAILROAD COMPANY, APPELLANT, V. SAUNDERS COUNTY ET AL., APPELLEES.

Construction of Statute. The "act concerning counties and county officers," approved March 7, 1879, did not take effect till September 1st of that year. The provisions of section 26 of that act have no application to valid county bonds issued before September 1st, 1879.

FURTHER consideration of case reported 16 Neb., 123.

Marquett & Dewese, for appellant.

T. B. Wilson and *J. R. Gilkerson*, for appellees.

MAXWELL, J.

An opinion was filed in this case in the year 1884, and but a single question was reserved for further consideration,

viz.: the right to levy ten mills on the dollar valuation to pay the interest on certain bonds issued to O. & R. V. Ry. Co. The referee found the assessed value of the taxable property of Saunders county for the year 1879 to be \$1,938,734.59, and that the county had issued its bonds in the year 1870 to the plaintiff in the sum of \$40,000, and in the year 1877 to the O. & R. V. Ry. Co. in the sum of \$140,000, all drawing interest at ten per cent. He also finds that said bonds were issued under the act of 1869 "and in pursuance of a vote of the electors of said county voting upon a proposition providing among other things for the levy of an annual tax to pay the interest on said bonds as the same becomes due;" that said bonds were duly registered as required by law and "that on the 9th day of June, 1879, the auditor of public accounts of the state of Nebraska certified to the county clerk of said Saunders county the amount of interest due and to become due for such year on said bonds, as required by sec. 4, page 174, Laws of 1875."

"That the clerk of said county, upon receiving such certified statements from the auditor, ascertained from the assessment roll of said county the amount of taxable property in such county, and what percentage was required to be levied thereon to pay said interest, and to create a sinking fund in compliance with the certificate of said auditor, and did levy said percentage upon the taxable property of such county, and did place the same upon the tax roll of said county.

"That the amount of the levy so made was ten mills on the dollar and is the ten mills mentioned and denominated as sinking fund," etc.

The record shows that the amount certified by the auditor in the year 1879 as due for interest on the bonds in question was the sum of \$12,000. The plaintiff claims that the "levy is illegal, not authorized by law, and is contrary to the constitution of the state of Nebraska," and

section 26 of the act of 1879, entitled "Counties and County Officers" is cited to sustain these views. The section is as follows: "Whenever the county board shall deem it necessary to assess taxes, the aggregate of which shall exceed the rate of one dollar and fifty cents per one hundred dollars valuation of the property of the county, except when such excess is to be used for the payment of indebtedness existing at the adoption of the constitution, the county board may, by an order entered of record, set forth substantially the amount of such excess required, and the purpose for which the same will be required, and if for the payment of interest or principal, or both, upon bonds, shall in a general way designate the bonds and specify the number of years such excess will require to be levied, and provide for the submission of the question of assessing the additional rate required to a vote of the people of the county at the next election for county officers after the adoption of the resolution. If the proposition for such additional tax be carried, the same shall be paid in money, and in no other manner." Comp. Stat., Chap. 18. The above section took effect on the 1st day of September, 1879, and is in no manner applicable to the taxes in question, nor indeed does the legislature possess the power to impair the validity of a contract by restricting the levy of taxes below what is required to pay lawful interest upon valid bonds already issued. There is no claim in the plaintiff's brief that the amount thus levied will produce a greater sum than is required to pay said interest, the sole claim being that the levy is unauthorized. This we find is not sustained. It is apparent that substantial justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

COBB, CH. J., concurs.

REESE, J., having been of counsel, did not sit.

17	381
18	82
19	677
24	809

DAVID MILLER ET AL., PLAINTIFFS IN ERROR, V. ANNIE
CURRY, ADM'R, ETC., DEFENDANT IN ERROR.

Justice of Peace: REVIVOR OF ACTION. The provisions of the code for the revival of actions and judgments apply to actions before justices of the peace.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

G. W. Shields, for plaintiffs in error.

J. J. O'Connor, for defendant in error.

MAXWELL, J.

The question presented in this case is the authority of a justice of the peace to revive a judgment rendered in his court that has become dormant by lapse of time. The court below held that a justice possessed no such power, and enjoined a sale on an execution issued on such revived judgment.

The code provides a complete system of procedure for the revival of an action upon motion, on the death of one or both of the parties to the action. Code, §§ 456 to 470 inclusive.

Section 473 provides that: "If a judgment become dormant it may be revived in the same manner as is prescribed for reviving actions before judgment."

Sec. 1085 declares "that the provisions of the code, which are in their nature applicable, and in respect to which no special provision is made by statute, shall apply to proceedings before justices of the peace."

These provisions evidently are applicable to justices of the peace, and without them in many cases there might be a failure of justice.

In *State v. Hunger*, ante p. 216, decided at the present

term, we held that where two or more executions issued out of justice's court against the same debtor, and were delivered to an officer on the same day, the provisions of section 484 applied, and no preference should be given to either of said writs. The mode of conducting the trial before a justice of the peace is regulated by section 283, while the authority of the justice to permit the jury to view the property, which is the subject of litigation, or the place in which any material fact involved in the action occurred, is derived from section 284 of the code. The form of the verdict, also the mode of returning it and polling the jury, are derived alone from the general provisions of the code. See §§ 290, 291, 285, 294, 287, etc. There are many other provisions of the code applicable to actions before justices of the peace, to which it is unnecessary to refer. It is the duty of the court so to construe the provisions of the code in their nature applicable to actions in justices' courts as to enable such justices to enforce and protect the rights of the parties before them and administer justice. We hold therefore that the provisions of the code for the revival of judgments are applicable to actions before justices of the peace.

The judgment of the district court is reversed and the action dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

CHRISTIAN K. OGG, PLAINTIFF IN ERROR, v. JOHN W.
SHEHAN, DEFENDANT IN ERROR.

1. **Verdict: SPECIAL FINDINGS.** Where, upon the trial of a cause to a jury, special findings are returned by the jury which are inconsistent with the general verdict, the special findings must control the general verdict, and the court should render judgment accordingly.
2. **Forcible Detention: LEASE NOT EXPIRED.** In an action for the forcible detention of real property by a lessee who is charged with holding over after the expiration of his term, if upon trial it is ascertained that the term for which the real estate was leased has not yet expired, the cause should be dismissed at the costs of the plaintiff in the action.
3. **Verdict: SPECIAL FINDINGS: JUDGMENT.** Where special findings are submitted to a jury by a justice of the peace upon the request of a plaintiff over the objections of a defendant, and the findings of the jury are against such plaintiff and in favor of the defendant, and are inconsistent with the general verdict, which is in favor of the plaintiff, the justice should render judgment in accordance with the facts found by the special verdict.

ERROR to the district court for Clay county. Tried below before MORRIS, J.

Dilworth & Smith and *John D. Hayes*, for plaintiff in error.

Hurd & Matters, for defendant in error.

REESE, J.

The defendant in error commenced an action before a justice of the peace against plaintiff in error for the forcible detention of certain real property which he had previously leased to plaintiff in error. The cause was tried to a jury, resulting in a verdict finding the plaintiff in error guilty as charged in the complaint. The record also shows that the justice, at the request of defendant in error,

and over the objection of plaintiff in error, submitted a special finding to the jury, in answer to which they returned a special verdict, as follows: "We, the jury duly impaneled and sworn, do find and say that we find the lease of defendant Ogg expired on the 28th day of February, 1883." The trial was had and the verdict returned on the 24th day of February, 1883. Plaintiff in error then filed a motion to set aside the general verdict and for judgment in his favor on the special finding of the jury and that the action be then dismissed. This motion was overruled and judgment was rendered in favor of defendant in error on the general verdict of the jury. Plaintiff in error then removed the cause into the district court by proceedings in error. Upon a hearing in that court the judgment of the justice was affirmed. He now brings the cause to this court, assigning for error the decision of the district court.

It is disclosed by the record made by the justice that the contention at the trial was as to the date of the expiration of the lease under which plaintiff in error held the land. If his lease had not yet expired the detention was not wrongful. The special verdict of the jury—returned at the instance of defendant in error—found that the lease had not expired and would not until four days after the trial. The evidence is not before us. The verdict of the jury must be treated as correct, and it must be presumed that it was sustained by sufficient evidence. It is provided by section 294 of the civil code that, "When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly." This is also sustained by reason and well established by the decisions of courts. See *Tobie v. Brown Co.*, 20 Kan., 14. *McDermott v. Higby*, 23 Cal., 489. *Baird v. C., R. I. & P. R. R. Co.*, 55 Iowa, 121.

The question as to whether or not it is competent for a justice of the peace to submit special findings to a jury on

Merriam v. Gordon.

a trial in his court is not before us in this case. The special finding was submitted upon the request of defendant in error over the objection of plaintiff in error, and defendant in error is bound by it.

It follows that the district court erred in affirming the judgment of the justice of the peace, and that the justice of the peace erred in not dismissing the action and rendering judgment in favor of plaintiff in error for costs.

The decision of the district court is reversed, and the judgment of the justice of the peace is also reversed and the cause dismissed.

REVERSED AND DISMISSED.

THE other judges concur.

17	325
20	407

Selden N. Merriam, Plaintiff in Error, v. Thomas B. Gordon, Defendant in Error.

1. **Opening Judgment: SERVICE OF NOTICE.** The proceeding under section 82 of the civil code, to open a judgment or decree rendered upon service by publication only, is a continuation of the original action, the exercise of a right existing by virtue of the character of the service, and the attorney for plaintiff in the action continues to be such, at least for the purpose of service of notice to open the judgment or decree, until the expiration of the time within which the motion to open the judgment may be made.
2. ———: ———. In such proceeding service of notice of the application upon the attorney for plaintiff in the action is a sufficient service under section 575 of the civil code.
3. ———: **ORDER INTERLOCUTORY.** An order opening a judgment or decree under the provisions of section 82 of the civil code is an interlocutory order, made necessary by the character of the service, and by the application of the defendant in the action within the time and in the manner fixed by law.

ERROR to the district court for Cass county. Heard below before POUND, J.

S. P. Vanatta, for plaintiff in error.

J. S. Mathews, for defendant in error.

REESE, J.

Both parties to this action are non-residents of the state. On the 14th day of June, 1878, defendant in error began a suit in the district court of Cass county for the purpose of canceling a tax deed which plaintiff in error held upon certain real estate owned by defendant in error. Service of notice of the commencement of the action was made by publication. A decree in favor of defendant in error was entered on the 24th day of April, 1879, by which his title to the real estate was quieted and the cloud caused by the tax deed was removed. On the 31st day of March, 1884, plaintiff in error caused notice to be served upon the attorneys who represented defendant in error (as plaintiff) in obtaining the decree of April 24th, 1879, that on the first day of the April, 1884, term of the district court he would apply to said court to have the judgment and decree opened that he might make his defense to the action. The application was filed on the 14th day of April, 1884. This application was supported by the affidavit of plaintiff in error that he had no actual notice of the pendency of the action in time to appear in court and make his defense. On the same day he filed his answer to the petition, setting up his tax deed, alleging the levy of taxes, the amount paid, etc., and asking that in case of the failure of his title the taxes paid might be declared a lien and be foreclosed, and for general relief. On the 29th day of the same month, and on the first day of the term of the court, defendant in error appeared specially and moved the court to

quash the pretended service of notice to open the decree, for the reason that the notice was not served upon him personally, nor upon any authorized agent or attorney of his. This motion was supported by the affidavits of the attorneys who obtained the decree, to the effect that they were not attorneys or counsel for defendant in error, and that at the time of the rendition of the decree their relation to him as attorneys ceased, and that they had not since that time had any interest in his affairs or business, and that they had so informed the sheriff at the time of the service of the notice. The motion to quash the service was sustained, and the application to open the decree was overruled.

Plaintiff in error brings the cause to this court for review upon the one question in the case, which is, is service of notice of an application to open a judgment under section 82 of the civil code, a sufficient service if made upon the attorneys who appeared for the plaintiff in the action at the time of obtaining the judgment or decree? The section of the code referred to is as follows: "A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order have the same opened and be let in to defend. Before the judgment or order shall be opened the applicant shall give notice to the adverse party of his intention to make such an application, and shall file a full answer to the petition, pay all costs, if the court require them to be paid, and make it appear to the satisfaction of the court, by affidavit, that during the pendency of the action he had no actual notice thereof in time to appear in court and make his defense. * * * * * The adverse party, on the hearing of an application to open a judgment or order, as provided by this section, shall be allowed to present counter affidavits to show that during the pendency of the action the applicant had notice thereof in time to ap-

pear in court and make his defense." The question here presented is not without its difficulties. It is insisted, and such is no doubt the law, that the relation of attorney and client ceases, so far as the particular cause is concerned, upon the adjournment *sine die* of the court at which a final judgment or order is made. Freeman on Judgments, § 103. The question then is, does the rendition of a decree or judgment where service is had by publication, amount to a final determination of the rights of the parties, or is an order opening such decree or judgment an interlocutory order, the notice of which is governed by sections 572 to 579 of the civil code? By reference to section 82 it will be seen that a party against whom a judgment or decree has been rendered *may* at any time within five years have the same opened and be let in to defend. In order to secure the right he must give notice to the adverse party of his intention to make the application, file an answer to the petition, pay all costs, if required by the court, and make it appear to the satisfaction of the court, by affidavit, that he had no actual notice of the pendency of the action in time to appear in court and make his defense.

It is quite clear that the right secured by this section is absolute. If the party desiring to open the judgment or decree complies with the requirements of this section and files an answer presenting a defense to the petition, there is no discretion vested in the trial court. The judgment or decree must be opened and the defense heard. *Brown v. Conger*, 10 Neb., 236. *Savage v. Aiken*, 14 Id., 315. This being the case it seems that at the time a judgment or decree is rendered upon constructive service it is affected with this infirmity. It may or may not be final, as the defendant may elect, if he is informed of it within the five years. His application is not in any proper sense a motion for a new trial. No trial has been had. No issues have been presented for adjudication. The court has had

no jurisdiction over him. While the results of the judgment are protected to innocent purchasers yet the judgment itself must give way at the election of the defendant. The judgment is final only so far as to bind the property affected, if in the hands of innocent holders. If the title to property has not been acquired by virtue of the judgment or decree it cannot be said to be a final determination of the rights of the parties until the expiration of the five years mentioned in the section.

"A motion is an application for an order addressed to the court or a judge in vacation, by a party to a suit or proceeding or one interested therein." Sec. 572, civil code. "Notices of motions mentioned in this chapter," *i. e.* civil code, "may be served by a sheriff, coroner, or constable, or by any disinterested person, and the return of any such officer, or affidavit of any such person, shall be proof of service. The service shall be on the party or his attorney of record if the said party or his attorney be resident within the county in which the motion is made, and in case there is more than one party adverse to such motion, service shall be made upon each party or his attorney." *Id.*, § 575.

"When the matter to be noticed is anything in the nature of an interlocutory motion or proceeding, arising in the course of a suit, either at law or in equity, including notices necessary to take testimony, notices of appeal, etc., the notice should be served upon the attorney when one is employed. And even where the attorney of record has retired from the case, but no one had been substituted as required by statute regulating the practice of the court, a notice served upon the retiring attorney, whose name still appeared upon the record, was held well served." *Wade on Notice*, § 1821, and see cases there cited. When an attorney is employed to prosecute an action to its termination he must be considered as the attorney for plaintiff for all the purposes of the action—so far as service of notices in the course of the suit is concerned—unless he is discharged

of record and another substituted in his stead, and he cannot so sever himself from his client as to release him from his obligation to advise him, when necessary, of all the steps which are taken in the case.

As the procedure to open a judgment or decree, under section 82 comes directly within the provisions of the civil code, and is affected by sections 572 and 573 above referred to, it follows that service upon the attorneys was a sufficient service.

The decision of the district court is reversed, with directions to re-instate the cause and try the issues presented by the answer of plaintiff in error.

REVERSED AND REMANDED.

THE other judges concur.

R. B. WASSON, PLAINTIFF IN ERROR, V. ALFRED L. PALMER, DEFENDANT IN ERROR.

1. **Vendor and Vendee: BREACH OF CONTRACT: DEED.** Where the vendee of real estate refuses to perform the contract on his part and an action is brought to recover damages for the breach, no tender of a deed for the property is necessary before bringing the action. The rule is different, however, where the action is to recover the contract price.
2. ——— : **DAMAGES.** In an action by the vendor to recover from the vendee damages for a failure on his part to perform the contract, the measure of damages is the difference between the agreed price and the market value of the property at the time of the breach.
3. **Evidence examined, and Held,** Not to sustain a verdict for \$758 damages, and leave given to remit.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

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31 579

17 330
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17 330
44 290
17 330
55 478

Harwood, Ames & Kelly, for plaintiff in error.

Lamb, Billingsley & Lambertson, for defendant in error.

MAXWELL, J.

This case was before this court in 1882, the judgment of the district court being reversed. 13 Neb., 376. On the second trial a verdict was returned in favor of Palmer for the sum of \$758, upon which judgment was rendered. It is alleged in the petition that on the 3d day of May, 1877, the plaintiff in error purchased from the defendant certain real estate adjoining the city of Lincoln, for the sum \$7,000; that \$100 in cash was paid at the time of the sale, and the sum of \$3,000 was to be paid in thirty days, and \$3,900 in sixty days thereafter; that the plaintiff herein wholly failed to comply with said contract, etc. Wasson in his answer admits the making of the contract and the payment of the money, but alleges the failure of Palmer to tender a warranty deed, and that said premises were incumbered with divers judgment liens and mortgages; that after the failure to complete the contract he and Palmer entered into a mutual agreement whereby he was released from all liability on the contract; that Palmer suffered no damages by his failure to complete the contract as the premises were of much greater value than \$7,000. Mr. Wasson, at the time he made the contract, was a resident of Ohio, and on returning home after making the same, wrote the following letter to his attorney:

“DOYLESTOWN, OHIO, May 8th, 1877.

“*J. E. Philpott, Esq.*:

“DEAR SIR—I have just returned home, have not been here long enough to fully learn the situation; but unless it turns out different from the outlook at this writing I will have to let my bargain in the Palmer residence together with the \$100 forfeiture inure to the benefit of Judge

Palmer. I think I will be able to secure myself against serious loss but will have property instead of money, and it may postpone my removal to your state for some time, I may be able to hypothecate some paper that I have for available funds; the chances for this, however, are against me, as I am not entitled to any bank accommodation except in New York, and the paper I have is not quoted nor salable as stocks in that market. The money crop in the country banks is so short that about all they can do is to take care of their regular customers, but when I have time to look around I may find things more favorable. Should such be the case I will advise you. I trust the "hopper" will pass off as only a scare, for the reason that this overcrowded country is looking in that direction, and the only detriment is fear of the insect, and unless some power unseen stops him he is certain to come here, being steadily on the march, and I learn is already as far east as the Mississippi. Please acquaint Mr. McMurtry (Palmer's agent) with the matter contained herein relating to the Palmer premises.

"Yours truly,

"R. B. WASSON."

The testimony conclusively shows that Wasson refused to complete the contract on his part, but his refusal was not placed on the ground of incumbrances on the property, but from his inability to meet the payments. Considerable stress is laid upon the failure of Palmer to tender a deed to Wasson before bringing the action. Where the vendor sues the vendee to recover the purchase money he must tender a deed, and if need be bring it into court to be delivered on the payment of the price. The reason is, he cannot keep the land and recover the consideration also. *Laird v. Pim*, 7 Mees. & W., 474. *Richards v. Edick*, 17 Barb., 260. *Wilson v. Martin*, 1 Denio, 602. *Spencer v. Halstead*, Id., 606. *Clark v. Mayor*, 4 Comst., 338. *Rankin v. Darnell*, 11 B. Mon., 30. But where the action

Wasson v. Palmer.

is merely to recover damages for a breach of the contract which the vendee has refused to perform no tender is necessary. Mr. Wasson in his answer admits the contract, admits his failure to perform, but justifies by alleging, first, a compromise with the vendor, and second, that the vendor has sustained no damages. On the issues as made by the pleadings no tender of a deed was necessary to put the plaintiff in error in default. He pleads his refusal to receive the deed, and claims justification.

Where the vendee refuses to complete his contract, and an action is brought by the vendor to recover damages for the breach of contract, the measure of damages is the difference between the agreed price and the market value of the property. *Griswold v. Sabin*, 51 N. H., 167. *O. C. R. R. v. Evans*, 6 Gray, 25. *Sanborn v. Chamberlin*, 101 Mass., 409. *Menson v. Kaine*, 63 Penn. St., 335. *Laird v. Pim*, 7 Mees. & W., 474. And this was the rule adopted by the court in the trial of the case.

2. A verdict for \$758, however, cannot be sustained. While there is some conflict in the evidence as to the value of the property at the time the contract was broken, a clear preponderance of it shows the value at that time to have been, at least, \$6,500. Some of the witnesses place it much higher than that, and it is apparent that no verdict fixing the value of the property at less than that sum can be sustained. It would subserve no good purpose to review the testimony at length or give a synopsis of that of each witness. Palmer has leave to remit from the verdict within 30 days the sum of \$358, in which case the judgment will be affirmed. Otherwise the judgment of the district court is reversed with costs to date.

JUDGMENT ACCORDINGLY.

THE other judges concur.

JAMES SHAW, PLAINTIFF IN ERROR, V. THE STATE OF
NEBRASKA, DEFENDANT IN ERROR.

Constitutional Law: JURY FEE. The constitution does not deprive the legislature of the authority to impose a reasonable jury fee to be taxed as a part of the costs against a person convicted of an offense.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

D. G. Courtney, for plaintiff in error.

William Leese, Attorney General, and *C. O. Whedon*, for defendant in error.

MAXWELL, J.

The plaintiff was found guilty of a misdemeanor by a jury in the district court of Lancaster county, and sentence imposed by the court. In the costs taxed against him there was a charge of \$6.00 as a jury fee. His attorney filed a motion to retax the costs, which being overruled, he brings the case into this court on error. He now claims that the statute authorizing the taxation of such jury fee is in conflict with section 1, article 9, of the constitution, which provides that "the legislature shall provide such revenue as may be needful by levying a tax by valuation," etc. Comp. Stat., § 29, Ch. 28.

The question here involved was before this court in *State v. Lancaster County*, 4 Neb., 537. Under the statute then in force a party "upon the commencement of a suit in the supreme court" was required to pay to the clerk the sum of \$10 for the use of the state. It was held that this provision was not in conflict with the constitution. It is said (page 540), "The theory of construction advanced on the part of the relator assumes that this power (of taxation) is limited by implication, upon the principle, *expressio*

17	334
30	852
17	334
46	530
17	334
56	593

Clemens v. Brillhart.

unius est exclusio alterius; but does this rule apply to the taxing power of the legislature? I think not. And as no positive restriction is imposed on the exercise of this power in respect to other matters not included in the objects and classes enumerated, I think the rule is that the framers of the constitution relied for protection in this regard upon the wisdom and justice of the representative body, and the accountability of its members to the people, rather than the restraining power of the courts of law," etc. This case was cited with approval in *State v. Dodge County*, 8 Neb., 124, and *Hanscom v. City of Omaha*, 11 Id., 46. These decisions appear to state the law correctly, and we adhere to them. The legislature, therefore, has power to impose a reasonable jury fee to be taxed as a part of the costs against a party convicted of an offense. There is no error in the record and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

GARRET S. CLEMENS, APPELLANT, V. GEORGE A. BRILLHART, IMPEADED, ETC., APPELLEE.

1. **Fraud: CONVEYANCES TO DEFRAUD CREDITORS: EVIDENCE.**

Where there are fraudulent transfers of property to prevent the collection of debts, it is the duty of the court to ascertain if possible the time and manner of the creation of the several debts in order to determine whether the transfers were made after the debts were incurred, or with an intention to create debts.

2. —: **PRESUMPTION.** Fraud will not be imputed where the circumstances and facts upon which it is based may consist with honesty of purpose.

3. —: **BURDEN OF PROOF.** A party attacking the validity of a transaction assumes the burden of proof.

17	335
23	420
17	335
23	136
17	335
146	359
17	335
44	879

4. **Parent and Child.** A father may emancipate his minor son and relinquish all right to his future earnings, and such relinquishment may be implied from circumstances.

APPEAL from Johnson county district court. Heard below before BROADY, J.

T. Appleget & Son, for appellant.

V. D. Metcalfe and Babcock & Davidson, for appellee.

MAXWELL, J.

This is an action to foreclose a mortgage executed by Jacob S. Brillhart to Andrew J. Brillhart on the 28th of April, 1877, upon certain real estate, to secure the payment of eight promissory notes of \$200 each, with interest at eight per cent. George A. Brillhart was permitted to intervene, and filed an answer wherein he alleges that in January, 1884, he commenced an action by attachment against Jacob S. Brillhart to recover the sum of \$2,426.20 and interest, and that the attachment was levied upon the mortgaged premises; that the mortgage in question was given without consideration, and for the purpose of defrauding the intervener. On the trial of the cause the court found that the lien of the attachment was superior to that of the mortgage and rendered a decree accordingly. The plaintiff appeals. The testimony fails to show that the plaintiff is a *bona fide* purchaser of the notes in question, and therefore he possesses no greater rights therein than the payee of the notes. Where there are fraudulent transfers of property to prevent the collection of debts, it is the duty of the court to ascertain the date and manner of the creation of the several debts in order to determine whether the transfers were made before or after the debts were incurred, or with a view to the creation of the debts.

It appears from the record that the mortgagee is a son of the mortgagor, and is of weak mental capacity; that in

the year 1869 the mortgagor was running a steam flouring mill at Fairbury, Illinois; that the son was fireman, and continued so employed until the fall or winter of 1871, when the mortgagor was indebted to him in the sum of \$500, for which he gave him his promissory note; that afterwards the mortgagor went to Arkansas and operated a saw mill for a few years, where the son assisted him, the amount of wages being agreed upon. Afterwards to secure this indebtedness the mortgage in question was made. The indebtedness to George A. Brillhart accrued partly in 1869, "part in 1870, and the balance in 1871." He fails to show what part accrued in these several years. For aught that appears the greater part of it may have accrued in 1871. He is attacking the validity of the transaction, and the burden of proof is upon him. *Hamilton v. Bishop*, 22 Iowa, 211. *Pratt v. Pratt*, 96 Ill., 184. *Darling v. Hurst*, 39 Mich., 765. *Wilds v. Bogan*, 55 Ind., 331. *Hathaway v. Brown*, 18 Minn., 414. *Miller v. Finn*, 1 Neb., 254. Fraud will never be imputed where the circumstances and facts upon which it is predicated may consist with honesty and purity of intention. Bump on Fraud. Conv. (3d edition), 603, and cases cited. Applying this rule to the testimony in this case we find that from 1869 to 1871 Jacob S. Brillhart was doing considerable business. It is not claimed that he was insolvent during those years. There is no proof or claim that the son did not render the services as alleged, nor that the amount of compensation agreed upon was not just and fair. Nor does the fact that the son was a minor at this time raise a conclusive presumption against him. While the law, in the absence of stipulations to the contrary, authorizes the parent to appropriate the earnings of his minor child, yet the right arises out of the obligation to support and educate the child. But there may be a mutual abandonment of the rights and duties of parent and child, and a relinquishment of all the property in the child's earnings. *Mc-*

Closkey v. Cyphert, 27 Penn. St., 220. *Dick v. Grissom*, 1 Freem. Ch., 428. *Dierker v. Hess*, 54 Mo., 246. And an insolvent father may give his son his time and future earnings so as to benefit the child as against the father's creditors. *Atwood v. Holcomb*, 89 Conn., 270. In other words creditors have no vested rights in the future earnings of the minor children of the debtor. A parent's relinquishment of all claim to the earnings of his minor child may be implied from circumstances. *Monaghan v. School District*, 38 Wis., 100. *Dierker v. Hess*, 54 Mo., 246. Schouler on Dom. Rel. (3d Ed.), 267. The testimony in this case raises a presumption of emancipation of the son and a liability of the father to pay for his services. The intervener therefore has no superior right over the son for the amount due for wages to 1871. As to the wages due for the services rendered in Arkansas, the proof is not so clear, but seems to sustain the finding of the court below. The decree of the court below will be modified so as to give the plaintiff a first lien on the mortgaged premises for five hundred dollars with interest at eight per cent from the year 1871 to date, and as thus modified it is affirmed.

DECREE ACCORDINGLY.

THE other judges concur.

17	338
34	282

E. B. APPLGATE, PLAINTIFF IN ERROR, v. KINGMAN & BALLARD, DEFENDANTS IN ERROR.

1. **Mortgage Foreclosure: SALE: CONFIRMATION.** Where, after the foreclosure of a mortgage and a sale of the mortgaged premises to the beneficiaries under the decree, and the confirmation of the sale, the mortgagor satisfies the decree, the money so received by the beneficiaries will avoid the sale and confirmation.

2. ———: DEED TO PURCHASER: NOTICE TO DEBTOR. When a long period of time elapses between the confirmation of a sale and the execution of the sheriff's deed, the debtor should be notified of the application for an order requiring the then sheriff to execute a deed to the purchaser.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

W. H. Snelling and *Harwood, Ames & Kelly*, for plaintiff in error.

Ricketts & Wilson, for defendants in error.

MAXWELL, J.

This is an action of ejectment brought to recover the possession of certain real estate in the city of Lincoln. The jury found the issues in favor of the defendants in error, and the court rendered judgment in their favor.

It appears from the record that in 1872 John M. McKesson and wife executed a mortgage upon the real estate in question to A. W. Cox, to secure an indebtedness to Cox, Kingman & Ballard; that at the April term, 1873, of the district court of Lancaster county, the mortgage was foreclosed and the real estate in question ordered sold. A sale under the decree was had in August, 1874, the purchasers being the defendants in error, who were the successors of the firm of Cox, Kingman & Ballard. In November of that year the sale was confirmed and the sheriff ordered to make a deed. The sheriff, however, failed to execute a deed at that time, and the record shows no further action until November, 1882, when an order was entered requiring the then *sheriff to show cause* why he should not be required to execute a deed for said premises. No cause having been shown, he was required to execute a deed to the defendants, which he afterwards did.

Neither McKesson nor his grantee appear to have been

Applegate v. Kingman & Ballard.

notified of the application for a deed. McKesson is the common source of title and the plaintiff derives his title from him. McKesson's deposition was taken and is in evidence in the case, and he swears positively that after the entry of the decree from 1873 to 1875, he paid the same in full, and in this he is corroborated to some extent by proceedings in garnishment against one Hedges, by which about \$26 was obtained, which is said to have been applied on the costs. None of this testimony as to payment is denied, Mr. Kingman merely saying that he has no recollection or record of the payment. This is not sufficient to overcome a direct and positive allegation of payment supported as it is by a number of circumstances tending to confirm it. If the decree was paid, even after confirmation, the defendants were not entitled to a deed. They could not accept satisfaction of the decree and also insist upon its enforcement. This the testimony tends to show they have done, and they cannot be permitted to hold the fruits of a decree, which, if McKesson's testimony is true, has already been paid in full. Where so long a period elapses between the confirmation of the sale and the execution of the deed, the court should require notice in some form, personal if possible, before the order to make the deed is entered, so that if any valid reason exists against the entry of the order, such as satisfaction of the judgment, it may be made to appear. The verdict and the judgment are against the clear weight of evidence and cannot be sustained. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

BANK OF CASS COUNTY, APPELLEE, V. JAMES E. MORRISON ET UX., APPELLANTS.

17	341
39	497
17	341
47	286
47	727
17	341
49	452

1. **Alteration of Written Instrument: EVIDENCE.** Where a material alteration is apparent on the face of a written instrument offered in evidence, the question as to whether such alteration was made before or after the execution and delivery of such instrument is, in the last instance, one for the jury or trial court. It is like any other fact in the case, to be settled by the trier or triers of facts. Generally in such case the instrument may be given in evidence and may go to the jury or trier of fact, leaving the parties to such explanatory evidence of the alteration as they may choose to offer.
2. **Appeal: FINDINGS BELOW.** In cases tried to a court without the intervention of a jury, the finding of questions of fact is entitled to the same respect in the supreme court on appeal as would be accorded to the verdict of a jury under like circumstances, and will not be interfered with unless clearly wrong. *McLaughlin v. Sandusky*, ante p. 110.

APPEAL from Cass county district court. Heard below before POUND, J.

Beeson & Sullivan, for appellants.

Orites & Ramsey, for appellee.

REESE, J.

This is an action to foreclose a mortgage given to secure two promissory notes. The suit was instituted by plaintiff as the endorser and holder of the notes. The defense is, that after the notes were delivered by the maker to the payee they were altered by erasing therefrom the words "from maturity," by which alteration they would purport to draw interest from their date. The district court found in favor of plaintiff, and entered a decree of foreclosure. The defendant appeals.

The only question presented is one of fact. Defendant

alleges the alteration was made after the delivery of the notes to the payee. Plaintiff contends it was made before delivery. Upon the trial the notes were offered in evidence, and upon objection to their admission William L. Brown, the payee, was called as a witness, who testified that the words were erased before the notes were signed by the maker. The notes were then admitted as evidence. Upon the part of the defense the defendant Morrison testified as positively that the erasure had not been made at the time of the delivery of the notes. He further testified that the indebtedness for which the notes were given grew out of a dissolution of a partnership between himself and Brown, and that the agreement between them was that he should purchase Brown's interest in the partnership for the amount stated in the notes, and that the notes should draw no interest until after maturity. Brown testified again that the notes were given for the purchase price of his interest in the partnership, as stated by Morrison, but that the contract and agreement was that the notes should draw interest from their date. Each witness seemed to be sustained by circumstances which were detailed in his testimony. Little if any light was thrown upon the question by other proofs.

It is claimed by plaintiff that as there is nothing in the alteration which renders the erasure suspicious, the burden is upon the defendant to show by a preponderance of proof that the change was made without his consent after the delivery of the note. It is insisted by defendant that the presumption is that the change was made after delivery, and that the burden was upon plaintiff to establish by a preponderance of testimony that it was not.

The authorities upon this question are not uniform, and hence each party is fortified by a number of decisions sustaining his view of the case.

In *Neil v. Case*, 25 Kas., 510, the supreme court of Kansas, by Chief Justice Horton, in discussing the question of

the burden of proof in cases of this kind, said: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated: *First*, That an alteration on the face of the writing raises no presumption either way, but the question is for the jury. *Second*, That it raises a presumption against the writing, and requires therefore some explanation to render it admissible. *Third*, That it raises such a presumption when it is suspicious, otherwise not. *Fourth*, That it is presumed in the absence of explanation to have been made before delivery, and therefore requires no explanation in the first instance.

* * * Generally, the instrument should be given in evidence, and in a jury case should go to the jury upon ordinary proofs of its execution, leaving the parties to such explanatory evidence of the alteration as they may choose to offer. If there is neither intrinsic nor extrinsic evidence as to when the alteration was made, it is to be presumed, if any presumption is said to exist, that the alteration was made before or at the time of the execution of the instrument. Perhaps there might be cases where the alteration is attended with manifest circumstances of suspicion that the court might refuse to allow the instrument to go before the jury until some explanation; but this case is not one of that character."

In *Paramore v. Lindsey*, 63 Mo., 67, it is said: "If nothing appears to the contrary, the alteration will be presumed to be contemporaneous with the execution of the instrument. But if any ground of suspicion is apparent on the face of the instrument the law presumes nothing, but leaves the question of the time when it was done, as well as the person by whom and the interest with which the alteration was made, as matters of fact to be ultimately found by the jury upon proof to be adduced by the party offering the instrument in evidence."

The record in the case at bar shows that the note was written upon a printed blank, and that the words "after

maturity" were printed in the blank, that the alteration was made by drawing a pen through those words, and thus erasing them. As to whether the ink with which this erasure was made was the same as that used in filling the body of the note, the testimony is silent. In *Corcoran v. Doll*, 32 Cal., 89, it is said: "When printed forms are used they frequently have to be altered to suit the terms of the contract, and where an alteration is made only as to the printed matter, the presumption is that it was made prior to the execution of the contract, and made to suit it to the terms agreed upon between the parties." But it seems to us that there must be many exceptions to this rule if it is to be adopted as applicable to cases where the printed matter only is changed. There may be many *indicia* upon the face of the note itself, even in such cases. Features may present themselves which would at once impress the mind with the idea that the change has been made out of the usual way; so that while it may do to say that ordinarily the rule laid down in the California case may be a safe one, yet each case must stand upon its own merits. As is said in *Niel v. Case*, *supra*: "It is impossible to fix a cast iron rule in all cases." In ordinary cases the alteration, perhaps, ought not to raise a presumption against the note, because the law will not presume wrong. If the instrument, when offered in evidence, shows upon its face anything which to the trial court is suspicious, and presents to the mind of the court a reasonable question as to whether the change was made in the usual and ordinary course of business, then, upon objection, proof sufficient to overcome *prima facie* the suspicious appearance should be required before overruling the objection. But if the change consists in nothing more than the erasure of printed matter in the blank used—without interlineation—the instrument should be admitted in the first instance. Upon this point much should be left to the discretion of the trial court.

Merriam v. Hemple.

The instrument having been admitted in evidence, with or without the preliminary proof, the question of the alteration, whether made before or after its execution, becomes a question of fact, like all other questions in issue, to be tried by the court or jury hearing the cause. *Wiel v. Case, supra.*

While the writer might not have decided the case as decided by the trial court, yet this court cannot, in the exercise of its functions as a reviewing court, say the decision of the trial court was wrong. The testimony upon the trial was conflicting and quite evenly balanced.

It has been the uniform holding of this court that in cases of conflicting testimony the decision of the trial court, whether upon error or appeal, cannot be reversed unless the weight of the testimony is so manifestly against the finding as to render it clearly wrong. *McLaughlin v. Sandusky, ante* p. 110, and cases there cited.

It follows that the decree of the district court must be affirmed.

DECREE AFFIRMED.

THE other judges concur.

Selden N. Merriam, Appellee, v. Mary L. Hemple
ET AL., Appellants.

Taxes: VOID SALE: SUBROGATION. Where the purchaser at a void sale of real estate for taxes pays the taxes legally levied upon the real estate for subsequent years, upon a failure of his title he will be subrogated to the rights of the county to the extent of the legal taxes so paid by him with legal interest, even though the taxes upon which the sale was had were void by reason of the default of the assessor in not filing the proper oath with the assessment roll.

17	345
39	299
17	345
41	353
17	345
42	55
42	163
17	345
48	175
17	345
57	683
17	345
60	781
17	345
61	270

APPEAL from the district court of Cass county. Heard below before POUND, J.

A. Beeson and George S. Smith, for appellants.

S. P. Vanatta, for appellee.

REESE, J.

The plaintiff filed his petition in the district court, in which he alleged that on the 6th day of September, 1872, W. D. Merriam purchased from the treasurer of Cass county 40 feet off the west end of lots number eight and nine, in block number forty-seven, of the city of Plattsmouth, in said county, for the taxes of the year 1871. That the certificate of purchase was duly assigned to him by said W. D. Merriam, and that the taxes for subsequent years had been paid by plaintiff. That on the 12th day of December, 1876, the county treasurer had executed to him a deed for said premises as required by law. The prayer of the petition is, that his title to said property be quieted, or if it should be found that his title has failed, that his lien for the taxes paid be foreclosed. The answer filed by defendants alleged various defects in the proceedings of the assessors, which were denied by the reply. The cause was then submitted to the district court upon a stipulation of facts. A decree was rendered, finding that the tax deed was invalid and conveyed no title to the property, and the same was accordingly canceled. The court further found that plaintiff had paid the taxes for the years 1872, 1873, and 1874, which with interest amounted to \$113.23, and that the taxes thus paid were a lien on the land, and rendered a decree of foreclosure in favor of plaintiff for that amount. Defendant appeals from this decree. The questions presented by the record have, with one exception, been recently passed upon by this court, so that, as

stated in appellant's brief, "the only question left for determination in this case is this: the taxes for the year for which the property was sold being invalid, because the assessor did not make oath to the assessment roll, has the purchaser a right to a lien for subsequent taxes paid by him?" Section 5 of the act of June 6th, 1871, Laws of 1871, page 82, which was in force at the time of the levy and payment of the taxes referred to, is as follows: "Taxes upon real property are hereby made a perpetual lien thereupon, commencing from the first day of March of the then current year, against all persons and bodies corporate, except the United States and this state." General Statutes, § 51, page 917.

Section 7 of the same act provides that, "Whenever the title acquired by a purchaser of real estate at treasurer's sale shall fail, the purchaser at such sale, or his heirs or assigns, shall have a lien upon the real estate so purchased for the full amount of the purchase money, together with interest thereon from the date of such purchase * * * and such purchaser, his heirs or assigns, may pay all taxes lawfully assessed on such real estate after such purchase, and when the said title shall fail may have a lien for all such taxes together with interest thereon at the rate aforesaid. The lien hereby created may be enforced in the manner directed by law for foreclosing mortgages." (See General Statutes, § 118, page 936.)

In *Pettit v. Black*, 8 Neb., 52, it was decided by this court that when the purchaser had paid the amount bid at a void sale into the county treasury, such purchaser would be subrogated to the rights of the county in the lien for the taxes and interest on the lands sold. See also *Wilhelm v. Russell*, Id., 128. *Reed v. Merriam*, 15 Neb., 325.

The trial court found that the sale for the taxes for 1871 was a void sale. Such was, perhaps, the fact. But that fact could not destroy the lien of the purchaser for the taxes paid by him at such sale, if the taxes were valid and the

sale void, on account of the irregularities of the revenue officers above the assessor. Neither could it destroy the lien for subsequent taxes legally levied, if the taxes for the year for which the real estate was sold were void. The fact that the sale was void furnishes the right of the purchaser to the lien. The fact that real estate had been purchased for taxes, whether at a void sale or not, gives the purchaser the right to pay subsequent taxes. If the title *fails*—if the sale is void—he is then subrogated to the rights of the county. The title failed in this case. The purchaser has paid the taxes levied subsequent to his purchase, in good faith, by virtue of his purchase. He is therefore subrogated to the rights of the county to the extent of the legal taxes paid by him.

The decree of the district court was correct and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ASA S. EDGERLY, APPELLANT, V. E. MARY GREGORY
AND JOHN S. GREGORY, APPELLEES.

1. **MARRIED WOMEN: POSSESSION OF PROPERTY BY HUSBAND.**

At common law, in order to constitute a reduction of the personal property of the wife to the possession of the husband so as to vest the title to the property in him, the act and the intent to so hold the property, must exist. The mere receiving of the money of the wife as agent or trustee with the purpose of investing it in real estate in the name of the wife would not be such reduction if the investment were made prior to the existence of the indebtedness to the satisfaction of which the property is sought to be appropriated.

2. ———: **DEBTS.** Real estate purchased with money inherited by the wife from the estate of her father and placed in the hands of

Edgerly v. Gregory.

the husband as agent or trustee for the purpose of having it invested in real estate in the name of and for the wife, will not be held liable for the separate debts of the husband, where the money was invested in such real estate after the passage of the act of 1871 relative to the rights of married women, and before the existence of the indebtedness of the husband for the satisfaction of which the property is sought to be applied.

3. **Findings Sustained.** Conclusions of law reported by the referee, *Held*, Sustained by the findings of fact.

APPEAL from Lancaster county district court. Heard below before POUND, J.

Ryan Brothers, for appellant.

J. S. Gregory, for appellees.

REESE, J.

This action was brought for the purpose of subjecting certain real estate to the payment of the debts of John S. Gregory. The judgment, to the satisfaction of which the property is sought to be subjected, was rendered on the 4th day of October, 1871, by the district court of Lancaster county in favor of plaintiff in an action then pending wherein Asa S. Edgerly (this plaintiff) was plaintiff, and James H. McMurtry, John S. Gregory, and John M. Young were defendants. Executions having been returned unsatisfied, a levy was made upon the property in question, which is held in the name of defendant, E. Mary Gregory, the wife of John S. Gregory, which levy was followed by the commencement of this action. The cause was by the district court referred to N. S. Harwood, Esq., of the Lancaster county bar, for the purpose of hearing the testimony and reporting his findings of fact and conclusions of law. The findings of fact and conclusions of law are as follows:

FINDINGS OF FACT.

"1. That said defendants, John S. and E. Mary Gregory, were married in Ohio in the year 1857.

"2. That in the years 1868 and 1869 the defendant, E. Mary Gregory, inherited from her deceased father's estate, in Michigan, the sum of nine thousand dollars, which sum, at the time aforesaid, in the state of Michigan, the defendant, E. Mary Gregory, paid over to her said husband, John S. Gregory, with the understanding that the said sum should be invested in real estate in Nebraska in her name.

"8. That John S. Gregory and his wife, at the time of receiving said money in Michigan, were citizens and residents of Nebraska, but whether said sum of money or any part thereof was, at the time above mentioned, brought to Nebraska and invested by said John S. Gregory, or whether it was invested in the state of Michigan or elsewhere, or used in his own private business, does not appear from the testimony.

"4. That between the 19th day of September, 1873, and the 10th day of October, 1876, real estate was purchased in Nebraska in the name of E. Mary Gregory, by or through the instrumentality of said John S. Gregory, aggregating in value nine thousand dollars and upwards, some portion of which she still holds, but what portion or what particular tracts or tract does not appear from the testimony. For a complete list of real estate so purchased and the value thereof, reference is here made to the stipulation of the parties hereto subjoined and included in said testimony.

"5. That the judgment on which this creditor's bill is based (Asa S. Edgerly vs. J. H. McMurtry, John M. Young, and John S. Gregory) was rendered in the district court of Lancaster county, Nebraska, on the 4th day of October, 1876, for the sum of six hundred and five dollars and seventy-nine cents, and costs.

"6. That all the real estate above mentioned was purchased and the title thereto taken in the name of the defendant, E. Mary Gregory, prior to the rendition of the plaintiff's judgment, except the n. $\frac{1}{2}$ of the n. e. $\frac{1}{4}$ of the

n. e. $\frac{1}{4}$ of the n. w. $\frac{1}{4}$ of section thirty-four, town ten, range six east, which tract does not now appear to be in the name of E. Mary Gregory.

"7. That the defendant, John S. Gregory, is and has been for the past fifteen years insolvent.

"8. That prior to the filing of the petition in this case the plaintiff caused execution to be issued out of the district court in the case of Edgerly vs. McMurtry et al., and a levy made on all of the lands, the title to which had at some time between September 19, 1873, and the date of said levy, been in E. Mary Gregory. But the evidence shows and it is conceded that all of the property so levied on was conveyed to the defendant, E. Mary Gregory, before the rendition of said plaintiff's judgment."

CONCLUSIONS OF LAW.

1. "I find as conclusions of law, that the nine thousand dollars so as aforesaid received by the defendant, John S. Gregory, from his said wife's estate was received in trust for a special purpose and did not become his own property.

2. "That the said money having been placed in real estate in the name of the defendant, E. Mary Gregory, according to the terms of the said trust, before any equities arose in behalf of this plaintiff, he is not in a position to complain.

3. "That the plaintiff has no cause of action against the defendant, E. Mary Gregory, and that his petition as to her should be dismissed with costs."

Exceptions were taken and a motion was filed by plaintiff to set aside the report of the referee. All of which were overruled, the report of the referee confirmed, and the action dismissed. Plaintiff appeals to this court.

It is not claimed, nor do we think it could be successfully, that the findings of fact as reported by the referee are not sustained by the evidence submitted to him. We have examined the record and are satisfied that the report

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of the referee is correct. Aside from certain records and a stipulation agreeing to the values of certain real estate, the evidence was confined to extracts from a deposition of E. Mary Gregory, taken in another cause, which were read by plaintiff, and the oral testimony of John S. Gregory on behalf of the defense. The deposition tended to show that Mrs. Gregory was not familiar with the business as transacted by her husband, and particularly so as to the description and numbers of the real estate purchased and sold by him in her name. The testimony of Gregory showed that in the years 1868 and 1869 Mrs. Gregory received the sum of \$9,000 from the estate of her deceased father in Michigan, and that at her request he had invested it in real estate in and near Lincoln.

Taking, then, the report of the referee upon questions of fact as correct, the remaining question presented is, does the findings of fact sustain the conclusions of law as reported by him?

It is claimed by plaintiff that as the nine thousand dollars was received in the years 1868 and 1869, and as the law authorizing married women to hold property in this state was not passed until 1871, we must look to the common law for light as to the ownership of the money with which these purchases of real estate were made. That the money having been, before the passage of the law, reduced to possession by Gregory it became his absolute property, and there being no promise on his part to repay it there was no legal indebtedness on his part, and hence the conveyance to his wife should be treated as fraudulent, and the property held for the payment of his debts. In this investigation we encounter some difficulties which seem to overcome the position assumed by plaintiff. There is no proof, and the referee does not find, that the money of Mrs. Gregory was ever invested by her husband in any property or business of his own, and that as early as the year 1873, two years after the passage of the law above referred

to, and three years before the date of plaintiff's judgment, the investment began, and that all the property was purchased in the name of Mrs. Gregory by her husband. In that case if the purchase was made for her out of the funds placed in his hands by her for that purpose it would be wholly immaterial to plaintiff as to what use her money was put. In order to constitute such a reduction of the property of the wife to the possession of the husband the act and the intent must exist. A promise to invest for the wife is not such a reduction to possession as to make the property or its proceeds liable to the payment of his debts, and especially so if the investment is made in pursuance of the promise prior to the existence of the indebtedness. The fact of his being a trustee or agent for the wife will not debar her claim to the property. *Wall v. Tomlinson*, 16 Ves., 413. *Dunn v. Sargent*, 101 Mass., 386. *Ryland v. Smith*, 1 M. & C., 53. *Savage v. Benham*, 17 Ala., 119. *Barron v. Barron*, 24 Vt., 375.

In *Deck v. Smith*, 12 Neb., 394, Chief Justice Lake, in writing the opinion of the court, in speaking of an instruction which had been refused by the trial court, says: "The idea embodied in this request seems to be that, inasmuch as Mrs. Smith received the inheritance, when by the law her husband was entitled to become the owner by reducing it to his possession, she could not hold it as against his creditors under the act just referred to (1871). But even if it were conceded that the personal estate inherited from her father by Mrs. Smith was liable for the satisfaction of her husband's debts prior to the act of 1871, it would by no means follow that such liability would continue after that act took effect, and as to debts subsequently contracted by him."

The conclusions of the referee, that the \$9,000 was received by John S. Gregory in trust for a special purpose, and that it did not become his property, and that the money having been placed in real estate in the name of

Ludden v. Hansen.

Mrs. Gregory according to the terms of the trust before any equities arose in behalf of the plaintiff, are supported by the findings of fact and must stand.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

17	354
57	11

SYLVANUS LUDDEN, PLAINTIFF IN ERROR, v. HARRY B. HANSEN, DEFENDANT IN ERROR.

1. **Taxes: DEED: PRIVATE SALE.** A tax deed purporting to have been issued on a *private sale* must contain a recital that the land had been previously offered for sale for such taxes at public sale, and not sold for want of bidders.
2. **Ejectment: EVIDENCE.** In an action of ejectment, a certificate of sale of the land in question for taxes was offered in evidence in connection with an offer of proof that a tax deed on such certificate had been demanded of the county treasurer and refused. *Held*, That such evidence was properly excluded.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

B. S. Baker, for plaintiff in error.

C. B. Letton, for defendant in error.

COBB, CH. J.

This was an action of ejectment brought by the defendant in error against the plaintiff in error for the possession of the eighty acre tract of land described in the pleadings. The petition was in the usual form. The defendant in said action answered by a general denial.

There was a trial to the court, a jury being waived, and a finding and judgment for the plaintiff.

A motion for a new trial having been overruled the cause is brought to this court on error.

The errors assigned are:

1. That the court erred in not admitting the tax deed between the state of Nebraska by Andrew W. Showalter, treasurer of Jefferson county, of the first part, and S. D. Ludden, of the second part.

2. The court erred in not admitting the county treasurer's certificate of tax sale of said Jefferson county, issued by the treasurer of said county, and in favor of A. H. Miller, and properly endorsed.

3. The court erred in not admitting the evidence of G. H. Turner, treasurer of said Jefferson county, for the purpose of showing that a deed was duly demanded on said certificate of tax sale of the land in controversy.

4. The court erred in overruling the motion for a new trial.

It appears from the bill of exceptions that after the plaintiff had introduced his evidence and rested, the defendant offered in evidence a tax deed for the land in controversy, to the introduction of which the plaintiff objected, for the reason that the place of the sale of the land for taxes was not shown by the deed, and also for the further reason that the said deed did not show on its face that the land in controversy had been offered for sale at public sale and not sold for want of bidders, which objections were sustained by the court and the said deed excluded. From a copy of the deed preserved in the bill of exceptions it appears that it purports to have been executed on a private sale made on the 10th day of September, 1873. The deed does not state at what place the sale was made, the blank in the printed form evidently intended to be filled up with the place of sale being left blank. Nor does it contain the statement that the land had been previously offered at

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public sale and not sold for want of bidders. In the case of *Haller v. Blaco*, 10 Neb., 36, the majority of this court held that a deed purporting to have been made on a public sale of land for taxes, which failed to state the place at which the sale was made, was properly excluded. I do not think that the reason of that decision would apply to a case of lands sold at private sale. I think that when it is shown to have become the duty of the county treasurer to sell lands for taxes at private sale, and he is shown to have made such sale, a presumption of law arises that such sale has been made at his office, where the law requires him to make it. But, as was held by this court in the case of *The State v. Helmer*, 10 Neb., 25, before the treasurer can lawfully sell lands for taxes at private sale, he must first offer them at public sale (obviously at one of the places where he is authorized to sell at public sale), and must make and file his report in the office of the county clerk, showing what property he has sold at public sale. And the statute then in force, Gen. Stats. p. 921, sec. 68, required him in all cases of private sales to execute and deliver a special certificate reciting that the said lands have been offered at public sale for taxes and not sold for want of bidders. It is true that the statute did not contain any form of tax deed modified to meet such cases, nor provide in terms that deeds made on such certificates should contain a recital of the facts which gave the treasurer the power to sell at private sale, but it being a question of power, I think it essential in the very nature of things that the conditions from which the power arises must be recited. This would be more especially so in case of a deed like the one now under consideration, which was executed on a sale purporting to have been made at private sale on the 10th day of September, for the taxes of the preceding year, when the statute did not require the county treasurer to make his report to the county clerk until on or before the first Monday of October following. In such

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case, I think, without an allegation to the contrary, the presumption would be that such report had not been made so long before the time required by statute. I think, therefore, that the deed was properly excluded on the second ground of objection.

The second and third points may be considered together. There was no error in refusing to receive the tax certificate in evidence, under the issue. A tax certificate alone is no evidence of title to land, nor is it even when connected with proof of a demand upon the proper officer for a deed thereon. Although a purchaser of land at tax sale may be entitled to a deed upon his certificate of purchase, and although in a direct proceeding for that purpose he would have the undoubted right to compel the execution and delivery of such deed to him by the county treasurer, yet he cannot dispense with such proceeding, and upon a trial for the possession of the land introduce evidence of his right to a deed. In a proper case, where a county treasurer captiously refuses to execute a tax deed, the court would stay proceedings in an action until the party entitled to such tax deed could have time to compel its execution and delivery by mandamus, but in no case at law can proof of a right to a tax deed be made to stand in lieu of the deed itself.

There was therefore no error in the rejection of the tax certificate when offered as evidence of title, nor in the rejection of the testimony offered to prove that defendant had made demand of the county treasurer that he execute and deliver a tax deed thereon and been refused.

It also follows that there was no error in the refusal of a new trial.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	358
22	525
17	358
33	752
17	358
36	287
17	358
38	884
39	318
17	358
54	184
17	358
56	698
17	358
58	799

GEORGE SMITH, PLAINTIFF IN ERROR, v. THE STATE OF NEBRASKA, DEFENDANT IN ERROR.

1. **Criminal Law: ADMISSION OF PRISONER.** The admissions or confessions of an accused on trial for a crime, made to an individual, out of court, without proof *aliunde* that a crime has been committed, will not justify a conviction.
2. ———: **EVIDENCE.** As a general rule, the guilt of the accused, or his participation in the commission of another crime wholly unconnected with that for which he is put on his trial, cannot be admitted in evidence against him.
3. ———: ———. But this rule has its exceptions in cases where the degree of knowledge with which the act charged has been committed or the motive for its commission are material elements of the crime.
4. ———: ———. This case falls within none of the exceptions.

ERROR to the district court for Cass county. Tried below before POUND, J.

Beeson & Sullivan, for plaintiff in error.

William Leese, Attorney General, for the State.

COBB, CH. J.

The plaintiff in error was indicted for the larceny of a gold watch and other articles of jewelry of the value of sixty-five dollars. Having plead not guilty to the charge, he was tried, found guilty, and sentenced to the penitentiary for a term of two years. He brings the cause to this court on error.

It appears from the evidence as preserved in the bill of exceptions that the watch and jewelry were lost at Atlantic, in the state of Iowa, and found in the possession of the plaintiff in error in Cass county, in this state. The testimony as to how the property came into the possession of the accused is as follows:

Maud Emery, being on the stand as a witness on the part of the state, and having testified that she was acquainted with the accused, was interrogated :

285. Did you have any conversation with him relative to the stealing of any property, jewelry, watches ?

A. Yes, sir.

287. You may state when it was, and where ?

A. It was in my own house, something over a month ago.

288. State what he said at that time ?

A. Told me he had some jewelry in his possession stolen by a man named Henry from a woman in Iowa. He said Henry hid it in the barn, and he removed it to a better place.

289. Did he say anything further ?

A. No, sir.

290. Say anything about his having seen Henry put it there ?

A. Yes, he said he saw Henry put it there. He followed him in and removed it. Put it in another place. He said he saw Henry hide the jewelry and he removed it to a new place.

291. What was said at that time, if anything, about his keeping the jewelry ?

A. Well, he said they were slyer than he was if they got it again. The man that stole it.

Alfie Hasson, also a witness on the part of the state, having testified that she was acquainted with the accused, her examination proceeded as follows :

318. Did you have any conversation with him relative to any jewelry ?

A. Yes, sir.

319. You may state where it was, and when.

A. It was at Miss Maud's.

320. When ?

A. About a month ago.

321. You may state what he said at that time?

A. He said he took the jewelry from where it was hid, and showed it to me.

322. What did he show you?

A. A watch and chain and two rings.

323. What kind of a watch was it, silver or gold?

A. Gold.

324. Lady's or gentleman's?

A. Lady's.

325. What kind of rings did he show you?

A. Both set rings.

326. What kind of a chain with the watch?

A. Lady's gold chain.

327. Did you state as to what he said as to where he got them?

A. Took them where they had been hid. Mr. Henry had hid them.

328. Tell you where that was that Henry hid them?

A. Yes.

329. Where?

A. Jones's livery stable.

330. Where is that?

A. Fourth street.

331. In Plattsmouth, Cass county, Nebraska?

A. Yes.

332. * * *

333. You may state whether anything was said to you about taking this jewelry and going to Omaha at that time. If so, what it was?

A. He said go to Omaha with them, the jewelry.

334. Just state fully what he said about that?

A. Did not have anything particular to say, cannot remember.

There was evidence that the watch and jewelry were found on the person of the accused when he was arrested.

In the case of *Priest v. The State*, 10 Neb., 393, this

court held that "a confession is not sufficient evidence of the *corpus delicti*. There must be other evidence that a crime has actually been committed, the confession being used to connect the accused with the crime."

The law as thus stated is fully sustained by the authorities there cited, as well as by the other cases cited by counsel for the plaintiff in the brief in the case at bar, and is undoubtedly correct.

The possession by an accused person of property proved to have been recently stolen is sufficient to fasten the guilt of its larceny upon the accused *prima facie*, and call upon him to prove the innocence of his possession. But that the property was stolen is the capital fact, and must be proven; and this, as we have seen, cannot be done simply by proof of the admission of the accused or his confession made out of court, and there being no evidence in this case that the watch and jewelry had been stolen, either recently or remotely, other than the admissions of the accused made out of court, the verdict is without sufficient evidence to sustain it.

There is another point in the case which it is deemed proper to mention.

Upon the trial the state offered in evidence against the accused the record of a proceeding in the county court wherein the accused had been charged, tried, and convicted of the crime of petit larceny in the stealing of one watch, chain, and charm, of the value of twenty-five dollars, on the complaint of one George M. Goos. This record was admitted over the objection of the defendant.

At the hearing the attorney general, with commendable frankness, admitted that for this error the conviction of the prisoner would have to be reversed, and declined to make expense to the state in an effort to sustain it.

The following observations are made in view of the new trial in the case.

As a general rule, when a prisoner is on trial for a crime

Kennard, Daniel & Co. v. Hollenbeck.

his guilt or participation in the commission of another crime wholly unconnected with that for which he is put on his trial cannot be admitted in evidence against him. But this rule has a great many exceptions in cases where the degree of knowledge with which the act charged has been committed or the motive for its commission are material elements of the crime. See Roscoe's Criminal Evidence, 7 ed., p. 92, and note 1; also *People v. Gray*, supreme court of Cal., The Reporter, vol. xix, No. 9, p. 270, an exhaustive case.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

17	362
17	407
17	362
43	330
17	362
60	769
17	362
61	658

KENNARD, DANIEL & Co., APPELLANTS, v. J. F. HOLLENBECK AND CHARLOTTE HOLLENBECK, APPELLEES.

Practice: EVIDENCE. Upon the facts set out at some length in the opinion, *Held*, That the appellants are entitled to recover.

APPEAL from the district court of Jefferson county
Tried below before MORRIS, J.

C. B. Letton and *W. H. Snell*, for appellants.

S. N. Lindley, for appellees.

COBB, CH. J.

This action was brought in the district court of Jefferson county by the plaintiffs against the defendants for the

purpose of subjecting certain real property in said county to the payment of a judgment rendered in said county in a certain proceeding by attachment on the part of said plaintiffs against the said J. F. Hollenbeck, in which the said real property was attached.

The petition in the court below alleges the recovery by the plaintiffs in the said court, at the September, 1883, term thereof, of a judgment against the said J. F. Hollenbeck for the sum of \$148.63, which judgment remains in full force and wholly unpaid. That in said cause, and at the said term of said court, the following property, which had been levied upon by virtue of an order of attachment sued out in said cause, was decreed and ordered to be sold to satisfy said judgment and costs: Lot eleven, in block nine, in Reynolds, Nebraska, and lots 3 and 4, in block 13, in Endicott, Nebraska. That said defendant, J. F. Hollenbeck, is wholly insolvent and has no property whatever to satisfy said judgment. That said J. F. Hollenbeck, at the time the indebtedness upon which said judgment was rendered accrued, was carrying on the business of dry goods and groceries, and on the 30th day of December, 1882, sold out his entire stock of dry goods and groceries, which stock included a large amount of the goods sold him by the plaintiffs, and for which said judgment was rendered, to one E. F. Miller, and then and there turned over to said Miller said stock, and at the same time said Hollenbeck was indebted to these plaintiffs for goods and merchandise that constituted a portion of said stock.

That the said Miller, as part purchase price of said stock, gave said J. F. Hollenbeck said lot 11, in block 9, in Reynolds, and lots 3 and 4, in block 13, in Endicott, and that the consideration paid by said Hollenbeck to said Miller was the sole and only consideration paid for said property. That said J. F. Hollenbeck had said property conveyed by said Miller to Charlotte Hollenbeck, the mother of said J. F. Hollenbeck, for the purpose of plac-

ing it beyond the reach of said J. F. Hollenbeck's creditors, and to hinder and delay and defraud the plaintiffs and other creditors of said J. F. Hollenbeck in the collection of their claims, as the said Charlotte Hollenbeck then well knew. And that said Charlotte Hollenbeck holds said property in trust for the use of said J. F. Hollenbeck, etc.

The defendants appeared by attorney and made answer by a general denial. There was a trial to the court, a finding and judgment for the defendants, and the plaintiffs' motion for a new trial having been overruled they bring the cause to this court by appeal.

By the bill of exceptions it appears that it was admitted by the parties in open court that the property described in the plaintiffs' petition was levied upon by virtue of an order of attachment issued out of said court in favor of Kennard, Daniel & Co. v. J. F. Hollenbeck, upon which a judgment was rendered in said cause, and was levied upon lot 11, in block 9, in Reynolds, Nebraska, and upon lots 3 and 4, in block 14, in Endicott, Nebraska. That said defendant, J. F. Hollenbeck, was a non-resident of the state of Nebraska, and that the only service of the pendency of said action defendant ever had was by personal service of summons upon him within the state of Iowa. It also appears from the evidence preserved in the bill of exceptions that all of the material allegations of the plaintiffs' petition were sufficiently proved; that the title to the said real estate in the said Charlotte Hollenbeck is only colorable; that she paid no consideration therefor, and that the same was placed in her name by the said J. F. Hollenbeck for the purpose of defrauding his creditors.

The appellees made no brief in the case, but it was stated at the hearing that the cause was decided in the district court on the question of the alleged deficient service of the summons in the attachment suit.

The object of the attachment proceeding was not to ob-

tain a general judgment against the defendant therein. Indeed a general judgment can only be rendered against a party who has been personally served within the jurisdiction of the court, or who appears; but the object of that proceeding was to hold the property in *statu quo* until a judgment could be rendered in a proceeding in which Charlotte Hollenbeck, the holder of the colorable title to the property, should be made a party. It is not necessary to say, and it is not said, that had a proper special appearance been made on the part of said J. F. Hollenbeck in the first cause he would not have been entitled to have the said attachment discharged. But the attachment having been served by seizing the real property within the jurisdiction, no service of the summons on the defendant being necessary for such purpose, such attachment would remain in force until discharged by the court and would not dissolve of its own weakness upon the making of an abortive attempt to serve the summons on the defendant therein. In the several cases of *Weil v. Lankins*, 8 Neb., 387, *Weinland v. Cochran*, 9 Id., 482, and *Crowell v. Horacek*, 12 Id., 625, it was held by this court that proceedings in the nature of a creditor's bill could only be maintained by judgment creditors. But the case at bar is relieved of the apparent difficulty of these cases by the admission recited in the bill of exceptions, that the plaintiffs had recovered judgment against the defendant, J. F. Hollenbeck. I will take occasion, however, to say that I do not think that the doctrine of those cases can be held strictly to apply to cases of non-resident defendants who have made fraudulent conveyances of property in this state, otherwise their general creditors would be without legal remedy. But I think that in such cases the plaintiff, having obtained his attachment and a special judgment thereon, can enforce his lien by action in the nature of a creditor's bill. See also *Keene v. Sallenbach*, 15 Neb., 200.

The judgment of the district court is therefore reversed

and the cause remanded to the district court with directions to render a judgment for the plaintiffs in accordance with this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	366
39	92
17	366
58	659

PETER FREDERICK, PLAINTIFF IN ERROR. V. JAMES F. KINZER, ADMR., DEFENDANT IN ERROR.

Instructions. The instructions of a court to a jury should be confined to the issues presented by the pleadings in the case and the evidence before the jury.

ERROR to the district court of Richardson county. Tried below before BROADY, J.

E. W. Thomas, for plaintiff in error.

John Saxon, for defendant in error.

COBB, CH. J.

On the trial in the court below, the court of its own motion instructed the jury as follows:

"In order to find that Peter Frederick is one of the makers of the note you must find either that he signed his name thereto or authorized some one to sign his name thereto, or since his name was signed thereto, ratified the act as his own."

The defendant prayed the court to give the following instruction:

"The jury are instructed that Kinzer cannot recover in this action unless it has been proved by the preponderance

Frederick v. Kinzer.

of the evidence either that Peter Frederick did sign the note or that it was signed by some person in his presence, and by his direction, or with his consent." To which the court added the following: "Or that since his name was signed to the said note he has ratified and adopted the act of so signing his name as his own." And with said words added thereto gave the said instruction in charge to the jury and not otherwise.

To the giving of the said first instruction and to the adding of said words to said second instruction and refusing to give it without the said words attached thereto, the said defendant excepted and assigns the same as error.

The pleadings consist of a petition in the usual form on a note alleged to have been signed by one George Weissenstein and by the defendant as "P. Frederick," an answer by the defendant Frederick denying the execution of said note, that he ever authorized any person to sign or execute the same for him or in his name, and denying any indebtedness from him to the plaintiff. There was no reply.

There is a sharp conflict in the testimony as to whether the note was signed by the said Frederick as a security, or his name written on the same by his daughter, a girl some twelve or thirteen years of age, in his absence and without his knowledge, at the request of the said George Weissenstein, the principal in the note. But there was no testimony tending to prove a ratification or adoption of the note by Frederick. There was some testimony, of a very unsatisfactory character however, of admissions on the part of Frederick that he had become security for Weissenstein for the price of a cow, for which the said note was alleged to have been given, but no mention of a note was alleged to have been made in such admissions. None of these admissions were alleged to have been made to the holder of the note or ever even brought to his knowledge before the trial.

It is an elementary principle that instructions should be confined to the issues presented by the pleadings and the

evidence in the case. Those under consideration, so far as they relate to the ratification or adoption of the signing of the note by Frederick, are quite inapplicable to either. As said in the opinion in the case of *Iron Mountain Bank of Missouri v. Murdock & Armstrong*, 62 Mo., 70, cited by counsel for plaintiff in error: These instructions "manifestly diverted the attention of the jury from that which was to that which was not in issue, thus defeating the very object which the law has in contemplation when requiring pleadings to be filed, and a court does not possess the power to change by instructions the issues which the pleadings present."

There were other exceptions presented, but as I have come to the conclusion that there must be a new trial for error in the instructions, they will not be considered.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with law.

REVERSED AND REMANDED.

THE other judges concur.

17	368
53	83
17	368
62	645

MARY C. HANLON ET AL., PLAINTIFFS IN ERROR, V.
CATHERINE POLLARD, DEFENDANT IN ERROR.

Homestead. A head of a family without a homestead purchasing a piece of property within the homestead limit as to quantity and value, with the *bona fide* purpose and intention of residing thereon as a permanent homestead, but who is temporarily prevented from occupying the same, by reason of the unexpired term of a tenant thereon existing at the time of such purchase, or other transient cause, and who does enter and reside upon the same within a reasonable time and without unnecessary delay, and continues to reside thereon, will take the same free of the lien of a judgment existing at the time of such purchase, or which may be rendered previous to the actual occupancy or residing on such homestead.

ERROR to the district court for Douglas county. Tried below before SAVAGE, J.

Thurston & Hall, for plaintiffs in error.

Charles H. Brown and J. J. O'Conner, for defendant in error.

COBB, CH. J.

An order to pay a deficiency on a sale of mortgaged premises was entered in the district court in favor of the plaintiff in error, Hanlon, and against the defendant in error. Execution was issued thereon, and placed in the hands of the plaintiff in error, Guy, the sheriff of the county, who proceeded to levy the same on certain real estate as the property of the defendant in error, and to advertise the same for sale. The defendant in error claimed the said real estate as her exempt homestead, and commenced an action against the plaintiffs in error, and enjoined the sale of said real estate.

Upon the trial there was a finding for the plaintiff in said action, and a judgment making said injunction perpetual; and the defendants bring the cause to this court on error.

The sole error alleged is, that "the judgment in said cause should have been for the defendants and not for the plaintiff upon the pleadings and testimony."

There are two distinct propositions discussed in the briefs. The first, as to the legality of the deficiency order against the defendant in error, upon which the execution issued; and the second, as to whether the land in question was exempt as the homestead of the defendant in error from the lien and levy of the said execution. It is deemed necessary to discuss the second question only.

It appears from the bill of exceptions that in the fall of

Hanlon v. Pollard.

1879 the defendant in error was a divorced woman with a family of children, the homestead on which she had resided up to that time having been mortgaged by herself and former husband. The mortgage was foreclosed, the property sold, the sale confirmed, and she ordered to pay a deficiency; and it was upon such deficiency order that her subsequently acquired homestead was sought to be sold.

This deficiency order was entered at the February term of said court, 1880.

It further appears that in the month of October previous, the defendant in error finding herself without a home for herself and family, purchased and received a deed therefor from one John Byrnes and wife, the eighty acre tract of land in question, on which there was a dwelling-house. The land and dwelling-house at the time she purchased it was occupied by a tenant whose lease would not expire until the first day of March following. This purchase was made for the purpose and with the intent on the part of the defendant in error to make it her home, and to occupy it as a homestead for herself and her family as soon as she could obtain the possession of it, which she intended and expected to do immediately upon the termination of the said tenant's lease. The manner in which she obtained the money to pay for the land, together with a consideration of her circumstances and condition of life, leave no room for doubt on that subject even were the direct testimony to that effect not satisfactory. The tenant vacated the premises on the 23d day of February, 1880, and the defendant in error immediately moved into the house, and has occupied the same with her family ever since. But on the 9th day of the same month, fourteen days before the actual occupancy of the homestead by the defendant in error, the said deficiency order was entered against her, an execution issued thereon, placed in the hands of the sheriff, and the same levied on the said property.

The question then for our consideration is, whether under

these facts plaintiffs in error were rightly enjoined from selling the homestead on execution. The first section of the homestead law then and now in force is as follows :

"Section 1. A homestead not exceeding in value \$2,000 consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated, not exceeding 160 acres of land to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof at the option of the claimant a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale, except as in this chapter provided." Comp. Stat., Ch. 36.

It is contended by plaintiffs in error that actual residence on the homestead from the very inception of the proceedings is indispensable to the existence of the right of exemption. But this is clearly not so in cases where the claimant owns two properties from either of which a homestead may be selected.

If it be conceded that in cases where at the rendition of a judgment the defendant is not actually residing on the homestead the judgment lien will attach to it, does it necessarily follow that such judgment and lien can be enforced by a sale of the property, although the same be almost immediately occupied by the defendant in such proceeding in pursuance of a previous intention to occupy it as a homestead? I think not. By the language of the statute the homestead within the prescribed limits as to extent and value, "including the dwelling-house in which the claimant resides," shall be exempt from judgment liens, and from execution or forced sale. I think that under a liberal construction of the law, and it should be liberally construed in favor of the people for whose protection it was enacted, it must be held that a purchase of a piece of land within the statutory limits as to quantity and value

with the *bona fide* intention of presently residing on it, or of residing on it as soon as some temporary obstacle to such residence can be removed, or some necessary preparation for residence can be made, is equivalent to actual residence for the purpose of exemption from lien, levy, and forced sale. In the above view we but follow the law as expressed by the supreme courts of Kansas, Iowa, New Hampshire, Kentucky, and Illinois, in the cases cited by counsel for defendant in error. In the former state, in the case of *Edwards v. Fry*, 9 Kas., 417, Brewer, J., in delivering the opinion of the court, said: "We know that the purchase of a homestead and the removal on to it cannot be made momentarily contemporaneous. It takes time for a party in possession to move out, and then more time for the purchaser to move in. Repairs may have to be made, or buildings partially or wholly erected. Now the law does not wait till all this has been done and the purchaser actually settled in his new home before attaching to it the inviolability of a homestead. A purchase of a homestead with a view to occupancy, followed by occupancy within a reasonable time, may secure *ab initio* a homestead inviolability." This case has been followed by the same court in the cases of *Monroe v. May, Weil & Co.*, Id., 466, and *Gilworth, v. Cody*, 21 Id., 702. Under the law of Illinois the approval and recording of a collector's bond attaches as a lien not only to the lands then owned by the principal but also to after acquired lands the same as in the case of a judgment. But in the case of *Crawford et al. v. Richeson et al.*, 101 Ill., 357, it was held by the supreme court that, where a collector who had given such bond "purchases land for a homestead and within a reasonable time thereafter moves upon and occupies it as such, the land so bought will be considered as becoming his homestead from the time of acquiring the title, and the lien will not attach, although a short space of time may have intervened between its purchase and occupancy." The cases cited from the other states named

Gregory v. Edgerly.

above are all to the same effect, but it is not deemed necessary to cite them further. Being fully satisfied from the evidence that the defendant in error purchased the premises in question in good faith for the purpose and with the manifest intention of making them her homestead, and that she went into the occupancy of the same within a reasonable time in pursuance of such purpose and intention, such acts, purpose, and intention on her part are deemed equivalent to actual residence on the property at the date of the entry of the deficiency order against her, and continuously thereafter.

I therefore think the judgment of the district court right, and it is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

JOHN S. GREGORY, PLAINTIFF IN ERROR, V. ASA S. EDGERLY, DEFENDANT IN ERROR.

Practice in Supreme Court. Assignments of error which in any manner bring before the court a question presented by the record will not be stricken out of the petition in error.

BY THE COURT.

The defendant moves to strike certain assignments of error out of the petition in error, upon the ground that they are not authorized by the record. When improper assignments are made they may be stricken out of the petition as irrelevant matter. This practice, however, is not favored, because only the errors relied upon by the plaintiff in error in his brief will be considered, the others being deemed waived. But in no case will the court strike

out assignments of error where they in any manner bring before the court a question or questions presented by the record. The assignments of error in this case seem to be justified by the record, and therefore, are not irrelevant. The motion is overruled.

MOTION OVERRULED.

Brown & Ryan Brothers, for the motion.

John S. Gregory, contra.

JOHN S. GREGORY, PLAINTIFF IN ERROR, v. ASA S.
EDGERLY, DEFENDANT IN ERROR.

1. **Judgment Lien: BANKRUPTCY: BURDEN OF PROOF.** One M. filed a petition in equity against a judgment creditor and two judgment debtors, co-defendants with him, wherein he alleged the recovery of a judgment in 1876 against himself and said debtors, which was an apparent lien upon his real estate. He also alleged that in 1878 he was discharged in proceedings in bankruptcy from the payment of the judgment. The discharge being denied, *Held*, That the burden of proof was on him to establish it.
2. —: **STIPULATION OF ATTORNEYS NOT BINDING ON CO-DEFENDANTS.** The attorneys for the creditor and M. entered into a stipulation that M. had been discharged in bankruptcy, as alleged in the petition. *Held*, That the stipulation did not affect the co-defendants with M. in the judgment, nor was it admissible in evidence against them.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

John S. Gregory, pro se.

Ryan Brothers, for defendant in error.

MAXWELL, J.

In 1883 James H. McMurtry brought an action in the district court of Lancaster county against Asa S. Edgerly, John M. Young, and John S. Gregory, to annul, discharge, and satisfy of record, so far as he was affected, a certain judgment for the sum of \$605.79, recovered in the district court of said county by said Edgerly against McMurtry, Young, and Gregory, and to discharge the lien of said judgment on certain real estate owned by said McMurtry. In his petition he alleges in substance that in 1878 he was adjudged a bankrupt, "and in said matter of bankruptcy the said indebtedness due said Edgerly was by this plaintiff duly reported and scheduled, and said Edgerly was duly served with notice of such proceedings in bankruptcy, and such proceedings were in said court in bankruptcy duly had that said Edgerly duly filed and made proof of his said claim, and afterwards this plaintiff was, in consideration of said court, on the 15th day of March, 1879, duly and legally adjudged to be and was discharged and absolved of and from all liability to his creditors, including said Edgerly," etc.

He also alleges that Edgerly had caused an execution to issue on said judgment, and had directed the sheriff to levy the same on the lands in question. The defendant Edgerly, in his answer, admits the recovery of the judgment for \$605.79, and that it is unpaid, and denies the other allegations of the petition. As a further answer he "says that said plaintiff has never paid any dividends, and that the assignee of said plaintiff never paid one cent of dividends or any distribution whatever in bankruptcy, and never complied with the requirements of the bankrupt law for a discharge." Afterwards the attorneys for Edgerly and McMurtry entered into the following stipulation: "It is hereby stipulated by and between the said plaintiff, James H. McMurtry, and the defendant, Asa S. Edgerly, that the

said plaintiff did obtain a discharge in bankruptcy as alleged; that injunction be made perpetual, as prayed in said petition, and said judgment adjudged to be released and discharged as to said McMurtry, and to be no lien upon his property. Complete record is by parties to this stipulation waived. Plaintiff waives right to recover or have taxed his costs herein. Above stipulation and judgment to be without prejudice to the rights of Asa S. Edgerly against said defendant Gregory and others interested with him, and cause to proceed on cross-petition of said Gregory." The court thereupon rendered judgment on the stipulation canceling the lien of the judgment and ordering the same to be discharged and satisfied of record, so far as McMurtry was affected. Gregory thereupon filed a motion alleging that Edgerly had voluntarily released McMurtry and asking to be discharged from liability on said judgment. The motion was overruled. The court afterwards rendered judgment against Gregory for the sum of \$605.79, with interest from October 4th, 1876, at 10 per cent. It will be observed that this is an action by McMurtry against his joint obligors and the creditor to have the lien of a judgment discharged and the judgment canceled as to him upon the ground that he had been discharged in bankruptcy from the obligation. As this discharge is denied, the burden of proof is upon him to establish it. A stipulation of his attorney with the attorney of the creditor that he was so discharged, while sufficient perhaps to prove that fact as between them, was no proof as against Gregory or Young. They cannot be bound by agreements to which they are not parties. And as the stipulation in question was the only evidence before the court when it discharged McMurtry, the answer of Gregory being on file denying that McMurtry was discharged from the payment of his debt, the court erred in rendering judgment discharging McMurtry.

2. The court also erred in rendering judgment against

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Gregory. The burden of proof was upon McMurtry to show that the debt in question was not one of those excepted from the operation of the act, and that he was discharged from the payment of the same. *Cooper v. Cooper*, 9 N. J. Eq., 566-569. This both his pleadings and proof fail to do. He appears to be the principal debtor in the case, and should pay the debt unless he establishes the fact of his discharge from it. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

MARY MILLER, APPELLEE, V. MARY S. BOEHME,
APPELLANT.

1. **Husband and Wife: MORTGAGE NOT SIGNED BY WIFE: DOWER.** Where a mortgage upon real estate was executed by a husband alone, and afterwards a second mortgage upon the same premises was executed by both husband and wife, which mortgage was thereafter foreclosed, both husband and wife and the first mortgagee being made parties, a sale under the decree was thereafter had, the sale confirmed, and a deed made to the purchaser, but the proceeds of the sale were not sufficient to satisfy the first mortgage, *Held*, That the wife's right of dower in the mortgaged premises was barred.
2. ———: **FORECLOSURE OF MORTGAGE: WIFE'S DOWER INTEREST.** A married woman who has not joined with her husband in the execution of a mortgage upon real estate not the homestead, if made a party defendant in an action to foreclose the mortgage, must assert her inchoate right of dower in the mortgaged premises or she will be barred by the decree.

APPEAL from Douglas county district court. Heard below before WAKELEY, J.

Redick & Redick, for appellant.

E. W. Simeral, for appellee.

MAXWELL, J.

This is an action to quiet the title to real estate. A decree was rendered in the court below in favor of the plaintiff, from which the defendant appeals. It appears from the record that in September, 1874, one Adolphus Boehme gave a mortgage on the land described in the petition to the plaintiff to secure the payment of \$2,500, and that the defendant did not join in the execution of the same. In 1876 Adolphus Boehme executed a second mortgage to one Smith upon the land in question and other property to secure the payment of \$7,000. This mortgage the defendant signed and acknowledged. In May, 1877, the plaintiff brought an action against Adolphus Boehme to foreclose her mortgage; but before she obtained a decree, Smith, the second mortgagee, brought an action to foreclose his mortgage, and made Adolphus Boehme and wife, Mary Miller, and others, defendants. The plaintiff herein filed an answer in that case, wherein she alleged that her mortgage was prior to that of Smith, and prayed for a decree of foreclosure, etc. A decree was afterwards rendered in the last case foreclosing both mortgages and declaring the Miller mortgage a prior lien on the property in question. An order of sale was issued on this decree and the property in question sold to Mary Miller, the plaintiff herein, for the sum of \$1,600, leaving a deficiency of about \$1,200. The sale was confirmed and a deed executed. The other property covered by the Smith mortgage satisfied that, except about \$600. In October, 1883, Adolphus Boehme died, leaving the defendant his widow. The plaintiff herein seeks to quiet her title under the master's deed, and the defendant alleges that she is not barred of her dower in

the real estate in controversy. The question presented is, whether or not the defendant is barred of her right of dower in the premises described in the petition. There was but one decree of foreclosure, and that was rendered in the Smith case. The question, therefore, is, what title did the purchaser under the decree acquire? Section 853 of the code provides, in case of foreclosure, that "deeds shall thereupon be executed by such sheriff, which shall vest in the purchaser the same estate that would have vested in the mortgagee if the equity of redemption had been foreclosed, and no other or greater; and such deeds shall be as valid as if executed by the mortgagor and mortgagee, and shall be an entire bar against each of them and all parties to the suit in which the decree for such sale was made, and against their heirs respectively, and all persons claiming under such heirs." In other words the purchaser takes the title of the parties to the action. If a wife is properly made a party it is her duty to make whatever defense she may have. If she fail to do so she will be barred by the decree. Even where the wife has not signed the mortgage she may be barred of dower in certain cases, as where a jointure is settled upon her with her assent before marriage, or where a pecuniary provision is made for her benefit in lieu of dower, to which she has assented. Comp. St., Ch. 23, §§ 13, 15. A wife, too, may be directly benefited by the money received by reason of a mortgage executed by the husband alone upon real estate belonging to him, as by the payment of incumbrances upon, or purchase of other real estate. The equity rule requiring all persons who have an interest in the mortgage or the mortgaged premises to be made parties to a bill of foreclosure is to give stability to the purchaser's title, prevent a multiplicity of suits, and enable the court to distribute the proceeds of the sale of the mortgaged estate among those having claims against the same. 4 Kent Com., 185. Any surplus remaining after satisfying the decree is to be paid

to the mortgagor. If a wife is made a party defendant in an action of foreclosure, and by suitable allegations is required to answer, there is certainly no valid reason why she should not be barred by the decree. Undoubtedly she may answer that she is not barred of her dower in the premises; but if she do so the effect will be to cast a burden upon the land and diminish to that extent the price for which the land can be sold. As there is a community of interest between the husband and wife, therefore, as a rule, whatever tends to enhance his pecuniary interests is equally beneficial to hers. She may, therefore, be desirous to have the mortgaged estate sell for the highest price possible, and in consequence thereof refuse to assert her inchoate right of dower in the premises, feeling assured that the increased price for which the property will sell will more than compensate her for any possible loss of dower she may afterwards sustain. A wife may bind herself by deed and thereby convey her estate or right of dower; and there would seem to be no reason why she should not be bound by a decree barring her right of dower to which she makes no objection. The statute, while enlarging the rights of the wife also increases her obligations, and makes her liable in many respects in relation to her property and rights as though she was unmarried. And this rule applies in an action to exclude her from any interest in real estate. If the court has jurisdiction she will be bound by the decree. As the defendant did not assert a claim for her inchoate right of dower in the premises described in the petition, and the decree of foreclosure appears to have been satisfactory to her, she cannot now complain. The decree must therefore be affirmed.

DECREE AFFIRMED.

THE other judges concur.

**FREDERIKA KLEEMAN, APPELLEE, V. SOPHIA PELTZER,
APPELLANT.**

1. **Parent and Child: CONVEYANCE TO CHILD SET ASIDE.** A transfer of property from a mother to a daughter, with a rent charge on a part of it during the life of the grantor, and providing that at her death a part of the value of such property should be divided between and paid to other daughters of the grantor, induced by a representation of the grantee that there was great danger of her losing said property by reason of certain litigation then pending, or about to be commenced, between her son and his wife, unless she made such transfer, when in fact there was no such danger, will be set aside by a court of equity.
2. **Real Estate: VOLUNTARY SETTLEMENT: POWER OF REVOCATION.** A voluntary settlement should contain a power of revocation; if it does not, the parties who rely upon it must prove that the settlor was properly advised when he executed it; that he thoroughly understood the effect of omitting the power, and that he intended it to be excluded from the settlement. If that is not established, and the court sees from the surrounding circumstances that the settlor believed the instrument to be revocable, * * * it will interfere and give relief against it. *Hall v. Hall*, L. R. 14 Eq., 365.

APPEAL from the district court of Dodge county.
Heard below before Post, J.

E. F. Gray, for appellant.

W. H. Munger, for appellee.

COBB, CH. J.

It appears from the record that the plaintiff and defendant are mother and daughter; that on and prior to the 17th day of April, 1882, the plaintiff was the owner of a farm, consisting of two hundred and eighty acres of land. She was a widow, over sixty years of age; had raised a family consisting of eight daughters and one son, all of whom

were married. The defendant, with her husband, resided on the said farm of the plaintiff as renters from year to year. The plaintiff sometimes resided with the defendant and her husband on the farm, and had been so residing for two or three months at the time of the transactions hereinafter mentioned; that on the day first above mentioned the plaintiff executed to the defendant two warranty deeds, by one of which, for the expressed consideration of two thousand dollars, she conveyed to her the north half of the east half (*sic*) of the north-east quarter of section 13, in township 19, in range 5 east; also the west half of the north-west quarter of section 18, in township 19, in range 6 east of the sixth principal meridian, containing in all one hundred and twenty acres; by the virtue of which she conveyed to her, for the expressed consideration of sixteen hundred dollars, the east half of the north-west quarter and the west half of the north-east quarter of section 13, in township 19, north of range 5 east of the sixth principal meridian, containing 160 acres, more or less, which land as conveyed by said two deeds constituted the farm hereinbefore mentioned.

That on the same day, and as a part of the same transaction, the said defendant, together with her husband, William Peltzer, executed and delivered to the plaintiff a mortgage, wherein and whereby for the expressed consideration of two thousand dollars they granted and mortgaged to her, the east half of the north-west quarter and the west half of the north-east quarter of section 13, in township 19 north, of range 5 east of the sixth principal meridian, containing one hundred and sixty acres, according to government surveys, with the following proviso: "Provided always and these presents are upon this condition, that, whereas, the said Frederika Kleeman has this day executed a warranty deed on the above described property to Sophia Peltzer, now if the said Sophia Peltzer shall pay one-third of all the crops raised on the above described

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land, and on the north half of the east half of the north-east quarter of section thirteen, township number nineteen north, of range five east, and the west half of the north-west quarter of section number eighteen, in township number nineteen north, of range number five east, and also shall, after the death of Frederika Kleeman, pay to the children of Frederika Kleeman the sum of sixteen hundred dollars, in equal shares, to the following named children, to-wit: Bertha, Frederika, Johanna, Wilhelmina, Louisa, and Augusta; it is expressly agreed and understood by and between the parties hereto that in case any of the above described provisions is not complied with, then this mortgage shall at once become due and payable and this mortgage absolute." * * *

That on the same day and, also as a part of the same transaction, Bernhart Kleeman, son of the plaintiff, and brother of the defendant, executed, acknowledged, and delivered, so that the same was placed on record, a receipt of which the following is a copy: "Know all men by these presents, that I, Bernhart Kleeman, in consideration of one thousand dollars, which I have heretofore received, do hereby acknowledge that I have received my full and just share of my mother's estate and that I am not entitled to receive anything further therefrom. In witness whereof, I have hereunto set my hand this 17th day of April, 1882." Signed and witnessed.

This action was commenced on the 4th day of August, 1883, for the purpose of recovering the title and possession of the said real estate by the said Frederika Kleeman from the said Sophia Peltzer, and of canceling the said conveyances.

The plaintiff in and by her petition alleges that at the time of executing the said conveyances she was living with the defendant, and had been for some time previous. That at that time and for some time previous thereto, one of her sons, to-wit: Bernhart Kleeman, the brother of defendant,

had been having trouble with his wife. That the defendant on said 17th day of April, 1882, and at various times prior thereto, represented and stated to plaintiff that plaintiff would lose the said above described land by reason of the trouble which was existing between her son and his wife, unless she parted with the legal title to said land. That plaintiff was at that time sixty-six years old, and was unable to understand business and legal matters. That relying upon the statements so made by her said daughter, the defendant herein, and believing the same to be true, the plaintiff made said deeds above mentioned to defendant, conveying the legal title to said lands and tenements above described. That said deeds were so made to defendant at the repeated request of said defendant, and without any consideration whatever.

That the said representations and statements so made as aforesaid by said defendant to plaintiff were false and untrue, and made for the purpose of obtaining the title to said lands, and thereby defrauding the plaintiff. That said lands were at the time of the executing of said deeds as aforesaid of the value of eight thousand dollars, and are of as great value at this time.

And that at the time of making said deeds of conveyance as aforesaid, the plaintiff was not indebted to any person or persons whomsoever, and had no creditors, and is not now indebted to any person or persons, and has not been indebted to any person or persons at any time since said 17th day of April, 1882. That plaintiff had requested the defendant to reconvey to her the said lands, but she has refused, etc.

The defendant, in and by her answer in said case, denied that she on the 17th day of April, 1882, and at various times prior thereto, represented and stated to plaintiff that plaintiff would lose the said land by reason of the trouble which was existing between plaintiff's son and his wife, unless she parted with the legal title to said lands;

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denied that at the time of making the deeds, as mentioned in said petition, the plaintiff was unable to understand business and legal matters; denied that plaintiff, relying upon statements made by defendant, and believing them to be true, made said deeds, or that plaintiff relied upon any statements or representations of defendant, or that said deeds were made at the request of defendant, or that said deeds were made without consideration; denied that defendant made any representations or statements to the plaintiff that were false, or that defendant defrauded the plaintiff or made any statement or representation to defraud plaintiff, or acquire the title to said lands, or that she obtained said conveyance through fraudulent or false representations; she denied that the said lands at the time, etc., of the value eight thousand dollars, or of any greater value than the consideration mentioned in the said deed, or that they are now of the value of \$8,000; and denied that at the time, etc., plaintiff was not indebted or had no creditors, or that she is not now indebted or that she has not been since said time.

And the said defendant further alleged that she purchased the said lands from the plaintiff at the plaintiff's solicitation and upon the valuable consideration that the defendant and her husband, William Peltzer, on the said day and simultaneous with the making of said deeds, duly executed and acknowledged to the plaintiff a contract and mortgage deed, in one instrument, and in the terms and to the effect that the defendant and her said husband thereby contracted to pay to the plaintiff one-third of all the crops raised on said land during the life-time of the plaintiff, and after her death to pay to the following named children of the plaintiff, to-wit: Bertha, Frederika, Johanna, Wilhelmina, Louisa, and Augusta, the sum of \$1,600, in equal shares, and to pay all taxes and assessments on said lands. And that by the terms and effect of the said contract and mortgage the defendant and her said husband duly con-

veyed the east half of the north-west quarter, and the west half of the north-east quarter, of section 13, in township 19 north, of range 5 east of the 6th principal meridian (being the 160 acres first described in said petition), to plaintiff by way of mortgage to secure the faithful performance of said several agreements. That thereupon, on the same day, the plaintiff caused the said mortgage to be duly filed and recorded. That thereupon the defendant and her husband took possession of the said lands, and have ever since been in the possession of and cultivating the same, and in the discharge of their agreement under said contract and mortgage deed. That the plaintiff has ever since the execution of said deeds and contract and mortgage deed received and accepted from the defendant and her husband one-third of the crops raised on said land in accordance with the terms of said contract and mortgage deed; and that defendant has made valuable and expensive improvements on said land. Also there was for the making of said deeds by plaintiff to defendant the further consideration therefor of mutual love and affection, to-wit: that usually existing between mother and daughter, and as well some services performed by defendant and her husband for the plaintiff. The plaintiff made reply that she denied that the said mortgage and contract mentioned in defendant's answer were made simultaneously with the making of said deeds, but said that the same were made subsequently by the defendant and her husband for the sole and only purpose and consideration of carrying out the fraudulent transaction by which said deeds were obtained, and for the purpose of making said fraudulent obtaining of said deeds by said defendant from the plaintiff appear to be a *bona fide* transaction, and that plaintiff accepted said mortgage contract only by reason of the false and fraudulent statements and representations made by said defendant, as stated in plaintiff's petition, and for further reply she denies, etc. The cause was tried to the

court, which found the issues for the plaintiff and decreed the reconveyance of the land by defendant to plaintiff, etc. And the defendant brings the cause to this court by appeal.

There are three points in the brief of attorney for the appellant, as follows:

1. The petition does not state a cause of action.
2. The evidence seeking to establish a parol trust is incompetent and irrelevant.
3. The evidence is not sufficient to sustain the decision.

Upon a careful reading and examination of the pleadings and evidence, in the consultation room, we all came to the conclusion that the petition does state a cause of action, and that the evidence, though nearly equally balanced, is sufficient to sustain the finding and judgment.

The theory of the plaintiff and her witnesses is, that the son of the plaintiff and brother of the defendant having been sued by his wife for divorce and alimony, on such suit being about to be commenced it was suggested to the plaintiff by the defendant that the lands of plaintiff were in danger of being taken away from her to satisfy said claim for alimony, and that the only way to save her land was to place the legal title thereto out of herself; that this suggestion was reiterated and urged upon her by the defendant until she was induced for that purpose, and for that purpose alone, to make such conveyance. That the deeds of her lands were made by plaintiff for that purpose alone. While the theory of the defendant and her witnesses is, that the plaintiff had long contemplated retiring from the care and labor of the management of the farm and of settling down in a small house in the neighboring village, and that she selected out the defendant and her husband from among the members of her family as the most proper persons to take charge of her property during her life, and to distribute its value among her heirs (with certain exceptions) after her decease; and that the

deeds of conveyance were made for that purpose and with that intent, and not for the purpose as contended by plaintiff.

There was evidence in the case tending to prove either of these theories, and it became necessary for the trial court to determine, upon the conflicting testimony and the circumstances of the case, which to believe.

Upon the theory of the plaintiff, if she was induced by the statements and persuasion of the defendant to believe that she was in danger of losing her land through the litigation of her son's wife unless she conveyed it, and she did convey it for the purpose of protecting it therefrom, such representations being untrue, and such apprehensions in fact groundless, then, under the authority of *Boyd v. De La Montaguie*, 73 N. Y., 498, and *Barnes v. Brown*, 32 Mich., 146, cases cited by counsel for appellee, she is entitled to have the deeds set aside. Or if, on the other hand, on the theory of the defendant, the deeds were intended to create a voluntary settlement in the defendant in trust for the uses and purposes therein expressed, then upon the authority of *Garnsey v. Munday*, 24 N. J. Equity, 243, and the numerous cases cited in the opinion by Chancellor Runyon, the court was justified in finding that the deeds were not "the pure, voluntary, well-understood act of the grantor's mind," but were unadvised and improvident, and contrary to her intention.

See also *Huguenin v. Baselay*, vol. 2, Lead. Cases in Eq., 556.

The decree of the district court is affirmed.

DECREE AFFIRMED.

THE other judges concur.

EVERETT G. BALLOU ET AL., APPELLANTS, V. JOHN
BLACK ET AL., APPELLEES.

1. **Constitutional Law: AMENDMENT OF MECHANIC'S LIEN LAW.** The act entitled "An act to amend chapter 42 of the General Statutes of Nebraska, entitled 'Mechanics' Liens,'" approved February 28, 1881, examined, and, *Held*, Not inimical to the provisions of section 11, of article 3, of the constitution, which is in the following words: "No bill shall contain more than one subject, and the same shall be clearly expressed in its title. And no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed." Nor is the said act affected by any irregularity attending its passage through the various stages of legislation.
2. **Mechanic's Lien: APPORTIONMENT OF LIEN.** The building contracted for and erected being a unit, and the contract for its erection containing a convenient method of apportioning its cost between the two owners, the same will be adopted by the court as a proper method of apportioning the lien upon the separate lots upon which it is situated.
3. —: **DELIVERY OF MATERIALS AT DIFFERENT DATES.** The lumber furnished by plaintiff for the erection of defendants' building was delivered in five parcels of nearly equal value—one on the 12th, one on the 14th, one on the 17th, one on the 20th, and one on the 28th days of September, and the sworn statement for lien was filed for record on the 25th day of November of the same year; *Held*, That the same constituted but one delivery, and that the lien was filed in due time to cover the whole.
4. —: **PAYMENTS BY CONTRACTOR.** All payments of money made by the contractor to the plaintiffs or their executor on general account, or the application of which were not made by him, and which were received after the first delivery for defendants' building, should be apportioned between the several accounts of plaintiffs for lumber by them furnished for the several buildings of the said contractor then in course of construction, in proportion to the amount due and remaining unpaid for each at the time of each such payment.

APPEAL from the district court of Cass county. Heard below before POUND, J.

17	389
21	147
94	130
17	389
32	422
17	389
35	283
17	389
48	873
17	389
50	529
53	247
17	389
459	110

A. C. Wakeley and R. S. Hall, for appellants.

R. B. Windham and A. Beeson, for appellees.

COBB, CH. J.

This cause was tried to the district court, which found for the defendants and rendered a judgment dismissing the action and sending the defendants hence without day. The grounds of such finding and decision are not stated in the judgment, nor are they apparent to this court upon an inspection of the record. It is stated, however, in the brief of counsel for appellants, that the decision was based upon the first point urged by the defendants in that court, to-wit: That the act of the legislature, approved February 28, 1881, entitled "An act to amend chapter 42 of the General Statutes of Nebraska, entitled mechanics liens," was void as being in conflict with the provisions of the constitution of the state.

In the argument in this court, counsel for appellees seek to attack the constitutionality of the act; first, by citing a part of section 11 of article 3 of the constitution, as follows: "Section 11. * * * No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the act contains the section or sections so amended, and the section or sections so amended shall be repealed." It is objected to the act under consideration, that it "does not purport to be an amendment of any existing law, does not refer to or contain any amended section or sections, but purports to be a new bill; and section 15 repeals chapter 42 of the General Statutes, and all other inconsistent acts." I think that it does purport to be an amendment. Probably the words "amend" or "amendment" are not embraced in the body of the act, but that such is the subject of the act is clearly expressed in the title. The clause of the constitu-

tion above quoted is a substantial copy of section 19 of article 2 of the constitution of 1867, which has been often construed by this court. In the case of *The People v. McCallum*, 1 Neb., 182, the effect and meaning of the section was quite thoroughly considered, and the following passage from Cooley Con. Lim., 152, was cited with approval: "It is believed, however, that the general understanding of the provision in question is different," (from the rule expressed in the early cases in Indiana and Louisiana) "and that it is fully complied with, in letter and spirit, if the act or section revised or amended is set forth and published as revised or amended, and that anything more only tends to render the statute unnecessarily cumbrous."

In the case of *Smails v. White*, 4 Neb., 353, in considering the effect of this provision of the constitution, the court say: "That an act *complete in itself* may so operate on prior acts as to materially change or modify them without being within the mischief designed to be remedied by or repugnant to this provision of the constitution is doubtless true," citing *People v. Mahany*, 13 Mich., 481, and *Davis v. The State*, 7 Md., 152. "But where, as in the case before us, the act is not complete in itself, but in its effect is simply and clearly amendatory of a former statute, it falls directly within the constitutional inhibition and is void. Nor will it make any difference in this respect, whether the new statute by its title or in the body of the act assume to be amendatory or not; it is enough if it clearly have that effect."

In the case of *White v. The City of Lincoln*, 5 Neb., 505, the court, by Judge MAXWELL, considering the said section of the constitution, say: "The object of this constitutional provision is to prevent surreptitious legislation by incorporating into bills obnoxious provisions, which have no connection with the general object of the bill, and of which the title gives no indication. It will be sufficient, however, if the law have but one general object

which is fairly expressed in the title of the bill." See also opinion by Chief Justice LAKE in *Jones v. Davis*, 6 Neb., 83. Also opinion by Chief Justice MAXWELL in *Sovereign v. The State*, 7 Neb., 408.

The act under consideration is complete within itself, and being amendatory of the entire act known as chapter 42 of the General Statutes, it was not necessary to make special reference to the several sections of said chapter.

The mechanic's lien law, of which the act under consideration is amendatory, although it had been for some time on the statute books of Nebraska territory, was re-enacted as chapter XXXV. of part 1 of "An act for revising, amending, consolidating, and re-enacting the civil and criminal codes and the laws of a general nature of the territory of Nebraska," approved February 12, 1866. The title of said chapter thirty-five in the said act is "mechanics' liens," yet its provisions included the liens of laborers and all persons furnishing any material or machinery for the erection, etc., of buildings, as well as the mechanic who should perform the mechanical work. At the time of this enactment there was no state constitution, so that no question under the constitutional provision which we have been considering would apply to it. The volume known as the General Statutes of Nebraska was not a revision, but simply a republication of the laws made under authority of the legislature. The person authorized to superintend such republication made certain changes in the arranging and numbering of the chapters, so that chapter XXXV. of the re-enactment of 1866 was numbered 42 in the said republication. Whether such rearrangement and renumbering was contemplated by the act authorizing such republication or not, the volume so rearranged and published has been for twelve years recognized by the courts, the legislature, and all departments of the state government as containing the statutes in force at the date of its publication. And I deem it entirely competent for the legislature to amend or

repeal any of such statutes by a proper reference to them by the number of the chapters and sections as therein published. See *Dogge v. The State*, ante p. 140.

Objection is also made to the act under consideration as to the manner in which the bill for its enactment passed the legislature. At the hearing we were all of the opinion that such objection could not be made originally in this court on appeal on error, but that had the journals of the legislature been offered in evidence at the trial in the court below they would be examined and considered here. But having come to the conclusion that there must be a new trial, it is deemed expedient to examine the said objection, and give the views of the court upon the matter therein involved.

It appears by the journals of the legislature that the bill by which this law was enacted was introduced in the senate, and became senate file No. 32, and was entitled "A bill for an act to amend chapter 42 of the General Statutes of Nebraska, entitled 'Mechanics' Liens.'" By this number and title it passed through every stage of legislation in either house, until its final passage in the house of representatives. After the vote had been taken—58 in the affirmative and 26 absent and not voting—the journal continues as follows: "By unanimous consent, the title was amended to read as follows: 'A bill for an act to establish a mechanic's lien law, and to repeal chapter 42, of the General Statutes of Nebraska, entitled "Mechanics' Liens.'" A constitutional majority having voted in favor of the passage of the bill, the bill passed and the title was agreed to as amended."

The effect of this proceeding, if it was entitled to have any effect, seems to have been lost sight of by the proper committee and officers of the legislature, as we find that the bill was never returned to the senate for concurrence in the said amendment, but was, on the same day, reported to the senate by the committee on engrossed and enrolled bills

as correctly engrossed by its original title; and by which title it was presented to the governor for his approval, and by which also it was by him approved, and now stands upon the statute book.

In an able article on "Constitutional Regulations of Legislative Proceedings," published in the *American Law Register* for March, 1885 (Vol. 24, No. 3), the writer says: "A slight change in the title of a bill will not invalidate the readings it had before the change was made. If the identity of the bill can be ascertained from the journals, and the change is not one of substance, and apt or calculated to mislead, the validity of the act will not be affected," citing *Larrison v. Peoria, etc., Railroad Co.*, 77 Ill., 11. *Walnut v. Wade*, 103 U. S., 683. *Plummer v. People*, 74 Ill., 361. *Supervisors v. Heenan*, 2 Minn., 281. While these authorities shed some light on the question involved in the case at bar, they cannot be said to conclude it.

While I am unable, in the limited time at my disposal, to find any authority to that effect, it has always been my understanding that even without a constitutional provision in regard to the title to bills, it was incompetent for either house of the legislature to amend or in any manner change the title of a bill which originated in the other. And when we consider the important office and purpose of the title, under the provisions of our constitution hereinbefore quoted, it must be apparent that any attempted change of the title, after the bill has gone through all the stages of legislation proper, cannot be upheld as within the constitutional legislative power. But as the said attempted amendment was not acted on by the committees or officers of the legislature, and as the bill was enrolled, presented to the executive, and approved with the identical title under which it had passed through every other stage of legislative action, I think that the law is unaffected by such attempted amendment.

If the views above expressed are correct, then it is unnecessary to enquire whether the title to the act or chapter of the general statutes amended by the act of 1881 is sufficiently broad to include the liens of material men under the provisions of section 11, of article III. of the constitution, or not. The statute being older than the constitution is not affected by its provisions in that respect.

2. It may be true that the contract for the erection of this building or block, as entered into between the trustees of the church and John Black and William Wincitt, is a several contract as between the parties to it; but the liability of the owners of the building or block for labor upon or material furnished for the same is necessarily a joint liability in the very nature of the case. The lumber, brick, and other material, when delivered at the site of the building, was not designated as for that part of the building owned by the church, or that owned by Dr. Black, but for the building generally; and as shown by the evidence of the foreman and workmen was applied and used indiscriminately upon either part of the building. Having examined with considerable care the numerous and somewhat conflicting cases cited by counsel on either side, I do not think there is much real difficulty in this case upon the point now under consideration. The defendants, each owning lots coterminous with each other, determined and, I think myself safe in presuming, agreed together to build a block of buildings thereon, locating the same so that that part of it which should stand upon the lot owned by the church should contain such halls, rooms, and apartments as should be suitable and appropriate to its uses and purposes, and that part of said block which should stand upon the lot of Dr. Black should constitute such halls, rooms, and apartments as should be suitable to his wants and purposes, and estimating that the cost of such building would be twelve thousand one hundred dollars, and the proportion of such cost between the said owners five thousand

one hundred dollars to the former, and seven thousand dollars to the latter; and it appears from the copy of the contract contained in the bill of exceptions that they contracted with William Wincitt to pay him for the labor and material entering into the erection and completion of the said building the gross sum, and in the proportion as between themselves as above stated.

It is also in evidence that the labor and material entering into the construction of said building was, so far as the same was paid for, paid by the said owners in the proportion of five-twelfths by the trustees of the church, and seven-twelfths by Dr. Black, they seeming to postpone the consideration of the odd one hundred dollars to a future adjustment.

This arrangement, and practice under it, by the parties themselves, furnishes a rule by which the court will be governed in apportioning and adjusting the lien between and upon the two several lots upon which the said building stands for whatever sum may be found due to the plaintiffs for material furnished for the erection of such building.

3. According to the bill of particulars and account of the plaintiffs, the material for which they seek to recover a lien was delivered at five several and different dates, to-wit: on the twelfth, fourteenth, seventeenth, twentieth, and twenty-eighth days of September, 1881, and the sworn statement thereof was filed for record in the office of the county clerk on the 25th day of November of the same year. Section 2, Comp. Stat., Ch. 54, provides as follows: "Any person or subcontractor who shall perform any labor for, or furnish any material, or machinery, or fixtures for any of the purposes mentioned in the first section of this act, to the contractor or any subcontractor, who shall desire to secure a lien upon any of the structures mentioned in said section may file a sworn statement of the amount due him, or them, from such contractor, or subcontractor, for labor or

material, machinery or fixtures, together with a description of the land upon which the same were done or used, within sixty days from the performing of such labor or furnishing such material, machinery, or fixtures, with the county clerk of the county wherein said land is situated; and if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor or material, machinery, and fixtures, on such lot or lots, and the improvements thereon, from the same time and in the same manner as such original contractor, and the risk of all payments made to the original contractor shall be upon the owner until the expiration of the sixty days heretofore specified. And no owner shall be liable to any action by the contractor until the expiration of said sixty days, and such owner may pay such subcontractor or person the amount due him from such contractor for such labor and material, machinery and fixtures, and the amount so paid shall be held and deemed a payment of such amount to the original contractor," etc.

One of the counsel for defendants makes the point that under the provision above quoted the lien of plaintiffs could in no event cover more than one delivery of lumber, as contained in the bill of particulars, the other four deliveries having been made more than sixty days prior to the filing of the lien. Counsel cites three New York cases where quite similar language has been construed as contended for by him. Yet, with great respect for the authority of the courts of that state, I do not think that the language or the spirit of the statute will enable us to follow that construction. The law on this subject, which existed through nearly all of our territorial life, and under the state government up to 1881, contained a provision limiting the time within which a lien could be filed, using language almost identical with that which we are now considering, except that the limitation under that law was four

months, the same as in section 2 of the present act. Under that act the question which we are now considering often came before the district courts, where it was uniformly held that the *completion* of a job or term of mechanical labor; or of the delivery of material or machinery for a building, was the point of time at which the four months began to run. And while the point never came before the supreme court, I have but little doubt of the correctness of such holding. The time within which the whole of the lumber was delivered according to the plaintiff's bill was reasonable and as to time should be treated as one delivery.

4. It appears that the plaintiffs' assignor had several accounts for lumber furnished for several buildings being constructed under different contracts by William Wincitt at the same time with the furnishing of the said lumber for the building of the defendants, and that during the said time the said Wincitt made payments of money on his account, generally to the plaintiff's assignor, without applying such payments upon any particular lumber, or upon that furnished for any particular contract. While, as a general principle, in cases of such payments, the party receiving them would have the right to apply the money on such concurrent account as he sees fit, yet under the peculiar circumstances of this case, and it appearing that at the time of the failure of said Wincitt such payments had been credited to the general account between said Wincitt and the plaintiff's assignor, we think that the defendants are entitled to a pro rata distributive share of all money paid by said Wincitt to the assignor of the plaintiffs' executor, or his assignor, or to the plaintiffs themselves, after the commencement of the delivery of lumber by him or them for the building of the defendants. Such money to be applied pro rata upon the amount due for lumber delivered for and charged to said Wincitt and then due plaintiffs, for each building then in course of erection by him or under contract with him, in proportion

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to the amount due on each at the date of each several payment.

The judgment of the district court is reversed and the cause remanded for further proceedings in accordance with law and this opinion.

REVERSED AND REMANDED.

THE other judges concur.

**BARNABAS WELTON, PLAINTIFF IN ERROR, V. ANGELINE
BELTEZORE, DEFENDANT IN ERROR.**

1. **Error: SUPERSEDEAS BOND.** Ordinarily the filing of a superseas bond is not essential to secure a review of a cause upon error. Such bond is only necessary if a stay of proceedings is desired pending the review of a judgment or final order.
2. **Final Judgment: EXCEPTIONS.** It is not necessary that exception be taken to a final judgment to entitle a party to have it reviewed.
3. **Replevin: DAMAGES.** Where the defendant in replevin lawfully held the property by virtue of a levy under an execution, the amount of which he was required to collect (the verdict being in his favor), the measure of his damages, within the value of the property, was the amount due upon the execution with legal costs and charges.

ERROR to the district court for Holt county. Tried below before TIFFANY, J.

H. M. Utley, for plaintiff in error.

Carlton & Gravor, for defendant in error.

REESE, J.

The defendant in error commenced an action in replevin in the county court against plaintiff in error for the pos-

17	399
19	583
23	916
17	399
33	975
17	399
29	91
17	399
30	263
31	584
17	399
46	886
17	399
49	539

session of certain property levied upon by him as the property of the husband of defendant in error. The cause was tried to a jury, who returned into court their verdict, which was as follows:

"ANGELINE BELTEZORE, }
v. }
BARNABAS WELTON. }

"We, the jury, duly empaneled and sworn in the above entitled cause, find that the right of possession of said property, when this action was commenced, was in the defendant, and we assess the value of said property at the sum of \$250.00. We also assess the damages sustained by said defendant by reason of the detention of said property at the sum of \$00.

"JOHN N. MILLS,
"Foreman."

A judgment was rendered in the following form: "It is therefore considered by me that said defendant have a return of the property taken on said writ of replevin, or in case a return of said property cannot be had, then he recover of said plaintiff the value thereof, assessed at \$250, and that he recover his damages for withholding the same, assessed at \$00, and costs of suit, taxed at \$32.80."

The plaintiff in that action—defendant in error here—then instituted proceedings in the district court by petition in error for the purpose of reversing the judgment of the county court, alleging as error the decision of the county court in rendering judgment against the plaintiff in the action for \$250, or any other sum, and for the reason that the verdict of the jury did not respond to all the issues in the case.

In the district court the defendant, plaintiff in error in this court, moved the court to strike the petition in error from the files and dismiss the action for the reason that no supersedeas bond had been filed, and for the further reason that no exceptions had been taken in the county court,

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This motion was overruled, and this ruling of the court is now assigned for error by plaintiff in error.

We know of no statute or rule of law which requires a plaintiff in error in this state to file a supersedeas bond as a condition precedent to a review of a judgment or final order, excepting in cases of collateral or auxiliary proceedings, where it is a necessary condition for procuring such review that some property or thing should be held by the process of the court pending such review, in order to make the judgment of the reviewing court effective. But where a judgment for money or the delivery of property is rendered against an unsuccessful litigant, if a stay of proceedings is required by the party seeking the review, he must file a supersedeas bond in order to secure such stay or suspension of proceedings. Otherwise the successful party may proceed to enforce the judgment, notwithstanding the action for review. Civil Code, §§ 588, 593.

The objection that no exceptions were taken to the judgment of the county court cannot be entertained. None was necessary. *Black v. Winterstein*, 6 Neb., 225. *Bank v. Buckingham*, 12 O. S., 224. *Morrow v. Sullender*, 4 Neb., 374. *Parrat v. Neligh*, 7 Id., 459. *Jones v. Null*, 9 Id., 257. There was no error in the ruling of the district court upon the motion.

The cause was then submitted to the district court upon the petition in error, whereupon the court rendered judgment reversing the judgment of the county court, and the cause was set down for trial in the district court. It is now alleged that there was error in this judgment. By reference to the verdict above quoted, it will be seen that the jury failed to find by their verdict as to who was the owner of the property in dispute. They simply found the right of possession of the property to be in the defendant. They also find the value of the property to be \$250. But they nowhere find the value of the defendant's right of possession. Since, by the verdict, the defendant was not

the owner of the property its value became unimportant. The value of his right of possession, within the value of the property, was the true measure of his damages.

Section 191 of the civil code provides that, "In all cases where the property has been delivered to the plaintiff, where the jury shall find upon issue joined for the defendant, they shall also find whether the defendant had the right of property, or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess such damages as they think right and proper for the defendant, for which, with costs of suit, the court shall render judgment for the defendant." By the next section (191a) it is provided that the judgment "shall be for a return of the property, or the value thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property and costs of suit." The value of the property itself is one thing. The value of a right of possession is quite another. In the case at bar the value of the right of possession of plaintiff in error was, within the value of the property, the amount of his execution and costs. The jury should have found the value of this right. The judgment then could have been for the return of the property, or, if a return could not be had, for the correct amount of damages as ascertained by the verdict. As the verdict failed to comply with the law in these essential respects the court could not legally render a judgment thereon. *Black v. Winterstein, supra*. See also *Warner v. Hunt*, 30 Wis., 202.

It follows that the decision of the district court in reversing the judgment of the county court was correct, and the same is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**MELISSA A. KIMBRO, PLAINTIFF IN ERROR, V. HORACE
G. CLARK AND W. SCOTT WARD, DEFENDANTS IN
ERROR.**

17	403
43	330
17	408
461	652

- 1. Parties: INTERVENORS.** Under the code of civil procedure of this state new parties to an action by way of intervention are permitted only where the intervenor claims some interest in the subject of the action. In an ordinary action on a promissory note, and in which action an order of attachment has been issued and levied upon real estate the title to which is held by a third party, the question of the ownership of the real estate cannot be adjudicated by the intervention of the holder of the title, that question not being involved in any degree in the action. In such case a judgment against the maker of the promissory note, and an order that the attached property be sold, will not debar the holder of the legal title from afterwards claiming title to the real estate.
- 2. Attachment: LAND OF NON-RESIDENT: CREDITOR'S BILL.** Where an attachment is levied upon real estate belonging to a non-resident debtor, or which it is claimed is owned by him, whether held in his own name or not, the attaching creditor acquires a lien upon the interest of the debtor, if any, in the land, which he may enforce after judgment by an action in the nature of a creditor's bill. Such an action may be maintained even though the original judgment was obtained without other service than by publication in a newspaper.
- 3. Creditor's Bill: CONSIDERATION: FRAUD.** In an action in the nature of a creditor's bill for the purpose of subjecting real estate to the payment of a judgment obtained upon a promissory note, the question of the consideration or purpose for which the note was executed is an immaterial one. Where it is alleged that the note was given only as a memorandum to show the amount to be paid to the payee out of the proceeds arising from the sale of property placed in the hands of the maker by the payee for sale, and that the maker of the note, contrary to his instructions, exchanged the property for real estate, causing the title to be taken in the name of his wife, and the holder of the note brought an action thereon, attached the real estate, procured a judgment for the amount due, it was *Held*, That such action on the part of the payee was an abandonment of any equities he might have arising out of the original contract, and in order to subject the real estate to the

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payment of his judgment it would be necessary to prove the fraudulent character of the conveyance the same as any other creditor.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Marquett, Deweese & Hall and Allen W. Field, for plaintiff in error.

Harwood, Ames & Kelley, for defendants in error.

REESE, J.

On the 19th day of December, 1881, defendants in error began a suit in the district court of Lancaster county against Robert L. Kimbro for the purpose of collecting the amount due them upon a promissory note executed by him to them. At the same time they caused an order of attachment to be issued out of said court and levied upon the west half of the south-east quarter of section number thirty-four, township seven north, of range seven, in Lancaster county. The defendant in that action was a non-resident of the state, and service was made by publication. The title of the land, as shown by the record of deeds for said county, was held by Melissa A. Kimbro, the wife of the defendant, Robert L. Kimbro. No appearance was made by Robert L. Kimbro, but his wife, Melissa A., appeared and filed a petition of intervention, claiming the land, and alleging that the defendant in the action had no interest or title in it whatever. The proceedings resulted in a finding by the court that Robert L. was indebted to the plaintiff, in the action in the sum of \$1,160.00, for which a judgment was rendered and the land ordered to be sold and the proceeds applied to the satisfaction of the judgment and costs. Afterwards the plaintiffs in that action, defendants in error here, began a suit in the same court, in the nature of a creditor's bill, alleging that they

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had caused the property to be attached but they were unable to sell the same for the reason that the title to the land stood in the name of Melissa A. Kimbro (plaintiff in error here), that the conveyance to her instead of her husband had been procured for the purpose of defrauding the creditors of the husband, and as against defendants in error was fraudulent, and asking that the title to the land for the purpose of the satisfaction of their claim against Robert L. Kimbro might be adjudged to be in him, and that it might be ordered to be sold and the proceeds of the sale applied to the payment of their judgment. A decree was entered in favor of defendants in error in accordance with the prayer of their petition, and plaintiff in error brings the case into this court for review by petition in error.

It is suggested by defendant in error that since plaintiff in error appeared in the attachment case and filed her intervenor's petition that "in such case the judgment and order of sale in the attachment suit will divest her of her title and render a creditor's bill unnecessary." No authorities are cited to sustain this view and we are inclined to believe the statement made by counsel that they "have not found any one having enough confidence in such opinion to be willing to purchase under the order of sale." Section 478 of the civil code provides that, "when, in an action for the recovery of real or personal property, any person having an interest in the property applies to be made a party the court may order it to be done." But our attention has not been called to any statute of this state nor to the decision of any court where the rights of third parties to property seized in the auxiliary proceeding of attachment can be adjudicated in an ordinary action upon a promissory note.

It is insisted by plaintiff in error that as no personal judgment could be rendered against Robert L. Kimbro in the attachment proceeding, the service having been by

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publication alone, that an action in the nature of a creditor's bill cannot be maintained to subject the land held by another to the payment of the judgment. That "if defendants (in error) by levying the attachment upon the land acquired a lien thereon, then it was not necessary for them to institute proceedings in the nature of a creditor's bill, and if they did not get any lien by reason of said attachment, then the court certainly had no authority to render judgment in the first case on the service by publication and attachment."

These questions have been decided by this court. In *Keene v. Sallenbach*, 15 Neb., 203, it is said that "when sufficient cause is shown for an attachment and one is issued and levied upon real estate belonging to the debtor, whether held in his own name or not, the creditor acquires a lien upon the interest of the debtor in the land, which he may enforce after the recovery of a judgment. When in such case it is necessary to set aside a conveyance alleged to be fraudulent as to creditors, an action may be commenced for that purpose against the alleged fraudulent grantee and other proper parties, and it is the duty of the court to render such decree in the premises as the testimony will justify." But it is said by plaintiff in error that it is a fundamental principle that an attaching creditor can acquire no greater right in attaching property than the defendant had at the time of the attachment. That the property having been conveyed to plaintiff in error, it is beyond his control, and he has lost his power over it, and it cannot be attached to satisfy his debt. While it is true that an attaching creditor or purchaser at judicial sale takes no higher or greater lien or title than was held by the defendant in the action, yet this principle is not applicable to cases where property has been fraudulently conveyed for the purpose of defeating the right of creditors to have the property applied to the payment of their claims. If the title to the property is held by another as a secret

trust for the benefit of the debtor who is the real owner, and if such ownership is merely colorable such property will be deemed to be held for the benefit of creditors, and the conveyance, while good as between the parties, will be held void as to them. *Sturdevant v. Davis*, 9 Ind., 360. Bump on Fraudulent Conveyances, 215. *Power v. Alston*, 93 Ills., 587. And is subject to the process of attachment.

The case of *Kennard, Daniel & Co. v. Hollenbeck*, ante p. 363, was a case in some respects similar to the case at bar, and is decisive of the question now under consideration. In that case, although it was stipulated that a judgment had been rendered in the attachment case, yet it was also stipulated that the only service of summons was a personal service within the state of Iowa. Property, the title of which was held by a third person, was levied upon under the attachment, and after judgment an action, similar to the one in this case, was instituted for the purpose of subjecting the land to the payment of the claim of the attachment creditor. In that case it is said that "in such cases the plaintiff having obtained his attachment and a special judgment thereon can enforce his lien by an action in the nature of a creditor's bill." See also *Haswell v. Lincks*, 87 N. Y., 637. *Ward v. McKenzie*, 33 Tex., 297.

In the holding of the district court upon the foregoing questions we see no error.

The counsel for plaintiff in error contend that there was no evidence submitted to the trial court of any fraudulent intent on the part of either the plaintiff in error or Robert L. Kimbro in the matter of the conveyance of the real estate in question to plaintiff in error by her grantor, Peter B. Stauffer.

The petition of defendants in error alleges substantially that prior to the execution of the promissory note upon which the judgment against Robert L. Kimbro was obtained the defendants in error were the holders of a promissory note executed by Robert Stradden for the sum of

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\$1,200, the payment of which was secured by a chattel mortgage upon a stock of goods owned by Stradden. After the maturity of the note, the maker having failed to pay it, they placed the note and mortgage in the hands of Kimbro for collection by the foreclosure of the mortgage; the proceeds to be paid over to defendants in error to the extent of \$898.34, the overplus, if any, to be retained by Kimbro. And that "solely as an evidence and memorandum of the amount of such proceeds which said Robert L. agreed to pay over to these plaintiffs (defendants in error), he executed and delivered to them a promissory note for said amount, on and bearing date the 10th day of December, 1879, and among other things it was agreed by and between said Robert L. and said Stradden and these plaintiffs (defendants in error) that said mortgaged property should be offered for sale and sold by said Robert L. for the purpose aforesaid, at retail, in the city of Sterling, Illinois." It is further alleged that Kimbro took possession of the goods, but instead of selling them and applying the money received from such sale as directed, he exchanged them with Stauffer for the land levied upon in the attachment suit, and for the purpose of defrauding defendants in error caused the title to be conveyed to plaintiff in error without any consideration having passed from her to Stauffer or Kimbro, her husband, and that plaintiff in error had full knowledge of all the facts alleged at the time she accepted said conveyance. It is also averred that defendants commenced the action upon the note, caused the attachment to issue and be levied upon the land, and that judgment was subsequently rendered for the amount due on the note, and the land ordered to be sold, and that Kimbro is insolvent. The prayer is that the deed from Stauffer be held fraudulent, and that the land be subjected to the payment of the judgment.

The answer of plaintiff in error admitted the execution of the notes to defendants in error, but denies any fraud or

knowledge of fraud on her part, and alleges a consideration paid for the land.

Upon the trial one of the defendants in error was sworn as a witness, and detailed the facts and circumstances substantially as alleged in the petition, excepting that it is shown that Kimbro had authority to dispose of the mortgaged goods—either at wholesale or retail—as he saw fit. The proof of his insolvency is not definite nor convincing; and no proof is offered anywhere of any fraudulent intent upon the part of either Kimbro or his wife (plaintiff in error) at the time of the execution of the deed by Stauffer, or at any other time. The note and a transcript of the attachment proceedings and judgment were also introduced in evidence.

Kimbrow and wife (plaintiffs in error) were each sworn on the part of the defense. Kimbro admitted the execution of the note to defendants in error, but testified it was executed to them for the amount due them upon the note and mortgage, and that he took the note and mortgage as his own, his note being given for the amount found due on final settlement, and that no contract or agreement was made whereby he was to return to defendants in error any part of the proceeds of the goods; that he sold of the goods in Sterling, at retail, for about six weeks, and then traded them to Stauffer for the land in Lancaster county. The deed was not executed until about a year after the trade, and not until he had commenced an action against Stauffer for the specific performance of the contract, when a settlement was made and the deed executed. They both testified that Mrs. Kimbro had previously furnished her husband five hundred dollars of money received by Mrs. Kimbro from her father, and at her request the land was deeded to her in consideration of the money furnished her husband. In the direct testimony of Mr. Kimbro he stated that at the time of the execution of the note to defendants in error they wanted to make a settlement; they were in

debt some, and were afraid he would be garnished for what they owed; that they wanted to make a settlement and get it out of the way of their creditors. The final settlement was made and the note given. This witness was cross-examined by Mr. Ward, who was a witness on behalf of defendants in error, but no mention is made of this particular fact detailed. W. S. Ward, one of the defendants in error—the one who transacted the business with Kimbro—was called as a witness in his own behalf on rebuttal, but no contradiction of the facts stated by Kimbro is made by him. This statement must be taken as true. If true it tends very strongly to contradict the theory of defendants in error, that the note was given solely as a memorandum, and the proceeds of sale of the goods belonged to them until their claim was paid.

It is evident from the record and the briefs of counsel that the decision of the district court was founded upon the theory of the case contended for by defendants in error—that the goods traded by Kimbro for the land constituted a kind of trust fund for the payment of their debt against Stradden—rather than any proof of fraud in the transfer of the land to Mrs. Kimbro. The testimony of both Kimbro and his wife is virtually uncontradicted. The cross-examination of the husband failed to develop anything in favor of defendants in error, and Mrs. Kimbro was not cross-examined at all.

Assuming, as we may safely do, that the decision was founded upon the theory above suggested, it becomes important to inquire whether or not the facts presented by the petition and evidence, if true, can in any view sustain the decree. The note was executed as alleged, on the sixth day of December, 1879. The goods were traded for the land as alleged. The deed was not executed until in November, 1880, after the commencement of an action to compel its execution. On the nineteenth day of December, 1881, an ordinary action at law was commenced upon

the note given by Kimbro to defendants in error, an attachment was issued and levied upon the real estate in question, and a judgment at law was taken for the amount found due upon the note. In all these proceedings no mention is made of any equities growing out of the consideration in favor of defendants in error. If such equities existed they were clearly abandoned by defendants in error, and in so far as this action is concerned they stand in no better attitude before the court than any other creditor with a just debt would stand. The question of the consideration for the note must be wholly eliminated, and if defendants in error succeed in the action at all it must be upon the ground that the deed from Stauffer to plaintiff in error was in fraud of the creditors of Robert L. Kimbro.

This being our view of the case it follows that the decision of the district court must be reversed and the cause remanded for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.

THE other judges concur.

WILLIAM J. WARRICK, PLAINTIFF IN ERROR V. FRANCES
ROUNDS, DEFENDANT IN ERROR.

1. **Liquors: ACTION BY MARRIED WOMAN: EVIDENCE.** In an action by a married woman, for herself and minor children, for damages for loss of means of support caused by the sale of intoxicating liquors to her husband, producing his intoxication and failure to provide for his family, after proof of facts tending to show that before such intoxication he provided for and supported his family, and that afterwards, and during the time of the intoxication, he failed to support the family, it is not error to allow the wife to testify as to the amount necessary to support the family in ordinary comfortable circumstances, suitable for

17	411
19	190
20	509
17	411
33	849
17	411
34	600
35	202
17	411
40	731
17	411
42	345
17	411
45	880
17	411
47	318
17	411
52	9
17	411
58	538

people in her condition. Such testimony would not be competent as establishing the measure of damages, but would be competent as tending to inform the jury as to the value of the means of support of which the plaintiff in the action had been deprived.

2. ———: ———: ———: **ERROR WITHOUT PREJUDICE.** When upon a trial of such action for damages, the defendant, a druggist, by his answer denied the sale of liquors to the husband, but upon the witness stand testified that he did on one or two occasions sell him liquor with quinine in it for malaria, and upon cross-examination he was, over the objection of his attorney, required to state whether he had a permit or license to sell liquors, *Held*, That his failure to claim the protection of a license or permit was, for the purposes of that trial, an admission that none existed, and therefore if there was error in the ruling of the court it was without prejudice.
3. **Instructions: EXCEPTIONS.** Objections to instructions to a trial jury will not be noticed by the supreme court, unless the attention of the trial court is first called to them by the proper exceptions taken at the time the instructions were given.
4. **Trial: VERDICT.** Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore, etc., Co. v. Grundrad*, 16 Neb., 529.
5. **Liquors: SALE TO HUSBAND: DAMAGES.** The rule of law, that where damages are suffered from the wrongful act of another the person suffering the injury must make all reasonable exertions to protect himself from the consequences of such wrongful acts, has no application to actions by a married woman for herself and children for loss of means of support caused by the wrongful sale of intoxicating liquors to the husband and father.
6. ———: **SALE BY DRUGGIST.** A druggist without a permit is absolutely prohibited from selling intoxicating liquors upon any pretext. Such druggist with a permit is equally prohibited from selling except in the best of faith, and strictly for the purposes specified by law.
7. **The evidence examined, and found sufficient to sustain the verdict.**

ERROR to the district court for Cass county. Tried below before POUND, J.

Strode & Clark, for plaintiff in error.

James E. Morrison and *Beeson & Sullivan*, for defendant in error.

REESE, J.

This action was commenced by defendant in error as the wife of Reuben Rounds for damages sustained by her and her minor children by reason of their loss of support produced by the sale of intoxicating liquors to said Rounds, causing his intoxication and rendering him incompetent to support his family. The cause was tried to a jury, who returned a verdict in favor of defendant in error and fixed her damages at one hundred and sixty-five dollars. A motion for a new trial was made by plaintiff in error, which was overruled, and judgment was rendered on the verdict, but without costs. Plaintiff in error, who was defendant below, now brings the case into this court for review by petition in error.

We will notice the alleged errors in the order in which they occur in the brief of plaintiff in error.

It is alleged that the court erred in permitting defendant in error to answer the following interrogatory:

"During this last winter, state as nearly as you can, what it would take a week to support yourself and family in ordinary, comfortable circumstance suitable for people in your condition, including your house rent?"

This question was objected to, the objection overruled, and she was permitted to answer. Her answer was as follows: "May be five or six dollars a week. Some weeks may be not so much." The testimony showed that defendant in error was the mother of four minor children; that up to the time of the inebriation of her husband he had provided for the family, and since that time the burden of supporting the family had devolved to a great ex-

tent upon her, which she did by means of washing for other people. But it was shown that during a part of the time of this inebriation he was able to and did labor, and, to a limited extent, contributed to the support of the family. It was sought to show the extent of his failure. The testimony was competent for that purpose. It is true that this class of testimony is, perhaps, not the most satisfactory method of ascertaining the damages suffered by being deprived of the support due from a husband and father, yet, in connection with the testimony already given, it would furnish some aid in arriving at the true measure of damages. The answer of the witness seems to have been in accordance with this view. The amount named by her is quite within reason, and fails to show any extravagant ideas upon her part.

In *Roose v. Perkins*, 9 Neb., 313, it is said that the "right of support is not necessarily limited to the bare necessities of life. The condition of the family" is proper to be considered by the jury. The testimony would have been incompetent in the first instance for the purpose of fixing the measure of damages, for, as said in *Roose v. Perkins*, the damages must be limited to that sustained by the loss of support, and is not governed by the amount necessary to maintain the family. He supported his family prior to the formation of his habit of drunkenness, he failed to do so afterward. In cases of this kind it would be very difficult to show the exact amount of actual loss. The family are deprived of an important element in the way of support, and in addition to this it is necessarily followed by the wasting of the means necessary to sustain and perpetuate the condition of intoxication. It, therefore, may become necessary to resort to testimony of the kind objected to for the purpose of aiding the jury in fixing the damages. In view of the other testimony already before the jury, it could not have misled them.

It is next insisted that the court erred in requiring plaintiff in error upon cross-examination as a witness, while on the stand, to answer the question as to whether he had a druggist's permit or a license to sell liquors. We think this question was wholly immaterial so far as the issues in the case were concerned, but not prejudicial to plaintiff in error. He admitted being a druggist, that he kept liquor in his store, and that he sold liquors for proper purposes. He admitted having sold some to Rounds but put quinine in it. If he had been in possession of a permit it would doubtless have been made to appear in his defense. The fact that no such defense was presented, was, in effect, an admission that he had none. His answer to the question could not have changed his position before the jury.

Objections are made to the instruction given to the jury by the court, but we will pass this part of the case without notice, as no exceptions were taken to any action of the court in that behalf.

The next proposition requiring attention is, that defendant in error "did not establish her claim by a fair preponderance of evidence." Upon this point it is sufficient to say there was a sharp conflict in the testimony. If the jury believed the testimony of defendant in error and her witnesses, the case was amply made. The oft-repeated purchase of liquor by Rounds, his carrying bottles of liquor home with the label of plaintiff in error attached to them, his constant and almost uninterrupted intoxication, are fully sworn to. The sales of liquor are, in the main, denied by plaintiff in error. The question as to the weight of the testimony was peculiarly within the province of the jury. There was evidence sufficient to sustain the verdict. *Sycamore Co. v. Grundrad*, 16 Neb., 529, and cases there cited.

It is said by plaintiff in error, that it was the duty of defendant in error to use ordinary and reasonable efforts

to protect herself from the consequences of the wrongful acts of plaintiff in error, and that the law imposes upon a party injured from another's tort the active duty of making reasonable exertions to render the injury as light as possible. Authorities are cited in support of this principle. We confess to some difficulty in applying the principles here invoked to the case at bar, and just how the rule can apply is not fully stated in the brief of plaintiff in error. There is no suggestion anywhere of any default on the part of defendant in error in the matter of making proper efforts to maintain the family, and it must be admitted that she was powerless to prevent the sale of liquors to her husband. The suggestion that it was her duty to notify plaintiff in error to cease selling her husband liquor is not to be entertained to any degree. We think the rule contended for has no application to this case.

The next contention on the part of plaintiff in error is, that the damages are excessive and that the verdict was result of prejudice. We think not. On the contrary, the verdict seems to have been produced by a conservative view of the evidence rather than otherwise.

While a strict construction of the evidence would, in our opinion, warrant a verdict of the amount returned, yet it might have been much larger. The purpose of the statute is to give a complete remedy for all damages resulting from a loss of means of support. "It in effect declares the act of producing intoxication a wrong, and makes every one who has contributed to it by furnishing intoxicating liquors a wrong-doer, and liable." *Elshire v. Schuyler*, 15 Neb., 561.

If the means of support is totally destroyed, the full value of such means is the measure of damages. If only partially, then such damages should be allowed as would compensate for such partial destruction. This rule does not limit a plaintiff in an action to such damages as might compensate for loss of time while intoxication lasts, but ex-

tends to such loss as is the direct result of such intoxication.

An individual may be intoxicated three days out of a week for a length of time, and by reason of such intoxication be wholly incapacitated for business or labor during the other three days. In that event the means of support for the whole working or business time of the week is destroyed, and the person furnishing the liquor is liable for the whole damage sustained thereby. The language of the statute is that a married woman may maintain her action "for all damages sustained by herself and children on account of such traffic." A careful computation of the time during which the intoxication lasts would not always be the correct basis from which to estimate damages.

While the foregoing virtually disposes of the case at bar, yet it seems to be required that we say further, that the action of plaintiff in error seems to have grown out of an impression indulged in by many, that druggists, in the language of one of the witnesses examined on the trial, have "a right to sell what they want to" if sold under some pretext as "medicine." That a little quinine mixed into a pint or a quart of whiskey or other intoxicant is a kind of leaven which will leaven the whole, and the druggist selling the mixture is guilty of no violation of either the criminal or civil provisions of the law.

Plaintiff in error testified in his examination in chief, on his own behalf, that he had no recollection of selling Rounds any liquor "except two or three times he came in and said he had malaria and I sold it to him with quinine in it." The law cannot with safety be thus evaded, and no druggist, whether he be the possessor of a permit or not, can by any such legerdemain evade its provisions. A druggist without a permit is absolutely prohibited from selling "upon any pretext." A druggist with a permit is

equally prohibited from selling except in the best of faith, and strictly for the purposes specified in the act.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur

R. F. MILFORD, PLAINTIFF IN ERROR, v. FRED LA RUE,
DEFENDANT IN ERROR.

Action on Promissory Note: DEFENSE. Where, in an action on certain promissory notes the maker, as a defense, alleges false representations of the payee by which he was deceived and sustained damages, *Held*, That if the evidence fails to establish false representations technical objections based thereon will not be considered.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

E. M. Coffin and Harwood, Ames & Kelly, for plaintiff in error.

A. M. Robbins and H. Westover, for defendant in error.

MAXWELL, J.

In November, 1880, the plaintiff herein executed three promissory notes, each for the sum of \$300, and delivered the same to the defendant. In June, 1881, the plaintiff paid \$100 on one of said notes. This action is brought to recover the balance due. As a defense to the action the plaintiff herein alleged in his answer "that the consideration of the said notes is the purchase price of a one-half interest in a certain water-power grist and flouring mill

situated on the ——— in Valley county, Nebraska, purchased by the defendant from the plaintiff. That on or about the 1st day of May, 1880, the plaintiff and one Ridell were the owners of the said mill as partners, and that on or about the said day the defendant purchased the interest of the said Ridell in the said mill, and that the plaintiff made the sale of the said interest to the defendant and for and on behalf of said Ridell; that the plaintiff represented to the defendant that the plaintiff was a millwright of long experience, and was well acquainted with the proper methods of construction and mechanism of water-power grist and flouring mills, and that the plaintiff had personally superintended and performed the work of constructing the said mill, and that the same was built and constructed in a safe, strong, and workmanlike manner; and that the plaintiff further represented that the foundation of the flume under the west end of the said mill was properly laid and protected from the ingress of water from the mill-race above the flume, and that for such protection he, the plaintiff, had constructed a plank wing extending from the corner of the flume eleven or twelve feet into the bank of earth at the north-west corner of the mill and reaching downward to the bottom of the flume, and that the east side of the apron leading into the flume was protected by a plank wall reaching down to a point level with the bottom of the flume, and that to keep the water from working through behind the said wall brush and earth were pounded in between the wall and the bank, and that the same was perfectly secure.

Defendant avers that he was wholly unacquainted with the proper method of construction and mechanism of water-power grist and flour mills, and that said representations were false, and plaintiff well knew them to be false, and the same were made willfully with intent to defraud the defendant and to induce the defendant to purchase the said Ridell's interest in said mills, and that the defendant relied

upon the said statements and representations of the plaintiff with reference to the construction of said mill as being true, and was induced thereby to purchase the interest aforesaid in said mill; and furthermore that the substructure of the said mill and the part whereof the said special representations were made was so covered with earth that the defendant could not determine for himself the truth or falsity of the plaintiff's representations without great labor and expense in removing the earth from about the foundation of the mill, and that the defendant examined the same so far as he was able to do. That on or about the 1st day of Nov., 1880, the defendant purchased the plaintiff's interest in said mill, and at the time of said purchase of defendant the representations set out in paragraph three of the answer were made and repeated at this time as well as at times previous, and that the said defendant relied on the representations made by the plaintiff as being true, and then after the said mill or trial of the same was found to be defective in its construction and not constructed as plaintiff represented it to be, and that the plank wing which the plaintiff represented as reaching downward to the bottom of the flume did not reach below the first floor of the flume, and there was nothing but earth behind the plank wall or on the east side of the apron to prevent the water forcing its way between the wall and the bank," etc.

It appears from the evidence that in the spring of 1880 La Rue and one Ridell were erecting the mill in question at Ord; that the plaintiff in error went to the mill to see Ridell to purchase his interest; Ridell not being present the plaintiff inquired of La Rue in regard to the mill, and afterwards purchased Ridell's interest therein. At that time the building was not entirely enclosed, the race had been dug and partly planked but none of the machinery was purchased or in place. After about six months from the time the plaintiff in error purchased Ridell's interest in the mill he bought the interest of La Rue therein for the sum of \$1,200, pay-

ing \$300 cash in hand and giving the notes in suit for the residue. The plaintiff had been present at the mill from the time he purchased Ridell's interest therein and knew, or could have known with reasonable observation, the exact condition of the flume and every matter relating to the mill.

During very high water in the spring of 1881 the water washed around the flume, and compelled the plaintiff in error to expend a considerable sum in repairing the same. There is also a claim for damages for the stoppage of the mill while the flume was being repaired. These charges are set up as a counter-claim against the notes. On the trial of the cause in the court below the jury returned a verdict in favor of the defendant in error for the full amount of the notes and interest. It is sought to reverse the judgment upon a number of technical objections that in our view need not be considered, as the circumstances of the case show that there were no false representations by which the plaintiff in error was deceived. The testimony shows that LaRue had nothing to do with the sale of Ridell's interest in the mill to the plaintiff in error. That after the purchase of that interest the plaintiff and defendant together, as joint owners, continued to work on the mill; that in November, 1880, the plaintiff in error purchased the defendant's half interest, with notice of all the facts relating to the construction of the mill. Some months afterwards, apparently from various causes, the flume washed out. This certainly was unfortunate, but the proof fails to show that the defendant in error was to blame for it, and he is not liable for the loss. It would subserve no good purpose to review the testimony at length. It is apparent that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

A. L. HUNT ET AL., PLAINTIFFS IN ERROR, V. H. R. MEWIS, DEFENDANT IN ERROR.

Action on Account: JUDGMENT NOT SUPPORTED BY EVIDENCE.

In an action on an account, where a jury is waived and a trial had to the court, if the judgment is not supported by the evidence it will be set aside.

ERROR to the district court for Pierce county. Tried below before TIFFANY, J.

Wigton & Whitham, for plaintiffs in error.

Edward P. Holmes, for defendant in error.

MAXWELL, J.

The plaintiffs are wholesale merchants in Chicago, and the defendant is the proprietor of a retail store at Wisner and also at Pierce, in this state. This action is brought to recover a balance due for goods sold and delivered by the plaintiffs to the defendant. The defendant plead a set-off, and on the trial of the cause, a jury being waived, the court found the issues in his favor, and rendered judgment on the set-off for the sum of \$38.23. The principal error relied upon is, that the judgment is not supported by the evidence. The testimony shows that the indebtedness was incurred in the year 1880. An itemized bill of the goods sold is set out in an exhibit attached to the deposition of one of the plaintiff's witnesses. That these goods were bought and received by the defendant is not seriously questioned, but it is claimed that they were received at the Wisner store and not at the one at Pierce. In November, 1881, the defendant wrote to the plaintiffs' traveling salesman that the plaintiffs "have commenced suit against me on an itemized bill of goods I bought for the Pierce store, where I hold my receipts showing full payment on all accounts

Johnson v. Sutliff.

against me at Pierce, consequently I denied the claim in court as a just debt against me; but I do not deny owing them at the Wisner store, which my brother Fred. runs, as his books show that I do owe them a balance. But you can be assured that I will pay them every cent, including interest, that is justly due them, and no more; and had they not been in such a terrible fury in bringing suit against me the matter could have been settled by this time," etc. The defendant does not deny any of the statements of this letter, and does not claim to have paid any portion of the account since the letter was written. The action is not brought on the account with the Pierce store alone, but for a general balance upon the account. This being so, it is very clear that the defendant is indebted to the plaintiffs, and that the judgment is not sustained by the evidence. It is therefore set aside and a new trial granted.

JUDGMENT ACCORDINGLY.

THE other judges concur.

FRED. S. JOHNSON ET AL., PLAINTIFFS IN ERROR, V.
HARVEY S. SUTLIFF, DEFENDANT IN ERROR.

Mills and Mill-dams: COSTS. In proceedings in *ad quod damnum* where there is no resistance the plaintiff is liable for the costs, and the provisions of sections 565 and 570 of the code in regard to permitting judgment for a specified sum to be rendered against the plaintiff do not apply.

ERROR to the district court of Seward county. Tried below before POST, J.

R. S. Norval, for plaintiffs in error.

D. C. McKillip, for defendant in error.

MAXWELL, J.

In October, 1882, the plaintiffs filed their petition in the district court of Seward county, against the defendant, praying for a writ of *ad quod damnum*. In November of that year an order was made in said court directing the sheriff to impanel a jury of inquest as provided in the mill-dam act of 1873. The jury were impaneled and made their report in writing. At the May, 1883, term of the court the defendant filed objections to the writ, which were overruled, and he thereupon filed an answer denying the plaintiff's right to the writ and claiming damages in the sum of \$1,000 by reason of the overflow of his land by the backwater caused by the plaintiff's dam. The question was tried to a jury and a verdict returned in favor of defendant for the sum of \$30. The court thereupon rendered judgment on the verdict against the plaintiffs and for all costs of the proceedings. This is the error complained of.

It appears from the record that in May, 1883, the plaintiffs made a written offer to allow or confess judgment for \$60 and costs to that date in favor of the defendants, and also in December, 1883, made an offer to confess judgment for \$100 and costs to that date. As these offers were not accepted the plaintiffs claim that the defendant is not entitled to costs after the dates named. The plaintiffs claim that sections 565 and 570 of the code apply to this case. Section 565 provides that "the defendant in an action for the recovery of money only, may, at any time before the trial, serve upon the plaintiff or his attorney an offer in writing to allow judgment to be taken against him for the sum specified thereon," etc. Sec. 570 provides that "after an action for the recovery of money is brought, the defendant may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action," etc. The

court below seems to have held that these sections did not apply to proceedings in *ad quod damnum*. In this we think it was correct. In such cases the property of the citizen is taken without his consent and appropriated to public use. This can only be done where full compensation is made for the damages sustained. These damages, if the parties are unable to agree upon the amount, must be ascertained in the manner provided by law. For the legitimate expenses incurred in ascertaining the amount of compensation to be paid to the land-owner the plaintiff in the proceedings is liable, otherwise the land-owner might be mulct in costs for defending his rights and his land be appropriated or damaged by others without just compensation; this the law will not permit. Proceedings in *ad quod damnum* are regulated entirely by statute, and the special provisions in the act for the taxation of costs control. Section 20 of the act provides that "should no resistance be made to proceedings brought under this act to obtain leave to build or continue a mill-dam, the costs shall be adjudged against the plaintiff; but if such costs be resisted in any stage thereof, the court shall equitably adjust the costs which are caused by *such resistance*, having regard to the event." Comp. Stat., Ch. 57. That is, the costs caused by resistance are to be taxed as justice may require; but for the other costs the plaintiff is liable. As none of the costs in this action seem to have been caused by undue resistance to the proceedings the plaintiff is liable for their payment.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**NATHANIEL J. YOUNG, PLAINTIFF IN ERROR, v. STEPHEN
ROBERTS, DEFENDANT IN ERROR.**

1. **Trial: VERDICT.** Questions of fact, and upon conflicting testimony, are to be decided by the trial jury, and a verdict will not be set aside on the ground of a want of sufficient evidence to support it, unless the want is so great as to show that the verdict is manifestly wrong. *Sycamore Co. v. Grundrad*, 16 Neb., 529.
2. **Replevin: TRIAL: LEVY: EVIDENCE.** Where, in an action of replevin of property levied upon by an officer as the individual property of A, and the property is claimed by the plaintiff as the partnership property of A & B, and upon trial the jury find specially that the property in controversy was the sole property of A at the time of the levy, the question of the right of the creditors of A to levy upon the partnership property of A & B becomes unimportant, and the refusal of the trial court to admit testimony tending to prove that the indebtedness of the partnership exceeded the assets, *Held*, Not prejudicial to plaintiff.

ERROR to the district court for Nance county. Tried below before BARNES, J.

M. V. Moudy and *J. R. Webster*, for plaintiff in error.

M. Whitmoyer, for defendant in error.

COBB, CH. J.

Plaintiff, Nathaniel J. Young, commenced an action in replevin in the court below, by which he sought to recover the possession of a stock of furniture levied upon by the defendant, who was the sheriff of Nance county. The petition alleged a special ownership in the property and the right to the possession thereof; that the property belonged to the firm of G. S. Young and plaintiff, who were brothers. The answer in effect admitted the partnership, but denied that G. S. Young and plaintiff were equal

partners, denied the wrongful detention of the property and the plaintiff's right to its possession.

From the transcript of the testimony it appears that on the 20th day of November, 1882, the defendant levied upon the property in question as the property of G. S. Young, to satisfy an execution then in his hands issued upon a judgment in the county court of Nance county against G. S. Young and Polly Young.

The contention on the trial on the part of plaintiff was, that the property in dispute belonged to the firm of G. S. Young & Brother, and on the part of defendant that it was the individual property of G. S. Young. The record also shows that what purported to be the articles of co-partnership was introduced in evidence, and that it was dated the 10th of November, 1882. But it does not accompany the transcript and we are wholly in the dark as to its provisions. Whether it supported the theory of plaintiff that the partnership went into effect on that date we do not know and cannot ascertain. The plaintiff and G. S. Young both testified that it did. The defendant sought to show that the partnership had no existence at the time of the levy, and for that purpose introduced the testimony of two witnesses (the county judge in whose court another cause had been tried and a juror who had sat in that cause) who testified substantially that on that trial plaintiff had sworn that he did not come to Genoa (the place where the store was located) until about the 20th of November, the date of the levy, and that the partnership was not formed until about twenty days after his arrival. The cause was tried to a jury, who returned a general verdict in favor of the defendant. They also returned a special verdict by which they found that G. S. Young was the sole owner of the property in controversy at the time it was levied upon by defendant. A motion for a new trial having been overruled, and a judgment rendered on the verdict, the cause is brought into this court by plaintiff, as plaintiff in error, for review.

Young v. Roberts.

A number of questions are presented by plaintiff in error in his brief, and upon the argument, touching the rights of the creditors of the individual members of a partnership, and as to the liability of partnership property for the payment of such creditors, also as to the proper procedure in such cases; and in that connection it was urged that the court erred in excluding from the jury the testimony offered for the purpose of showing that the liabilities of the partnership exceeded the assets. Considering the theory upon which the case was tried, this ruling may have been erroneous; but this question, with all others presented, except that the verdict is not sustained by the evidence, is, in our view, disposed of by the special verdict of the jury. If the jury were justified by the evidence in finding that the property in controversy belonged to G. S. Young, the judgment debtor, at the time of the levy, all questions as to the rights of partners and partnership creditors are out of the case, and the rulings of the trial court upon such questions become of no consequence. As we have seen, the evidence is not all before us. But if it were, and the contracts were as claimed by plaintiff in error, yet we should be compelled to hold the verdict of the jury is sustained by sufficient evidence. In *Sycamore, etc., Co. v. Grundrad*, 16 Neb., 529, it is said, "In the examination of the question, it must not be forgotten that the jury are the judges of questions of fact, and that a verdict will not be set aside as against the weight of evidence, unless clearly wrong. Such has been the uniform holding of this court." See also cases there cited. Applying this rule to the case at bar, it must be held that the verdict must stand, and that the special verdict is final. See *Bierbower v. Polk*, ante p. 268.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

M. B. LOWENSTEIN, APPELLANT, V. JAMES A. PHELAN
ET AL., APPELLEES.

17	430
39	700
17	429
57	201
17	429
58	381

Mortgage: STIPULATION AS TO TIME WHEN DEBT DUE. A provision in a mortgage that "if the annual interest on any of said notes, or of any one of said notes, remains unpaid for thirty days after maturity, this entire debt, all of said described notes, principal and interest, shall become immediately due and payable, and this mortgage may then be foreclosed," is permissive merely, and the entire debt will not become due unless the mortgagee elect so to declare by instituting an action to foreclose.

APPEAL from Nemaha county district court, POUND, J., presiding.

E. W. Thomas, for appellant, cited: *Fletcher v. Daugherty*, 13 Neb., 224. *Mallory v. Railroad*, 35 New York, 174. *McLelland v. Bishop*, Ohio, 1884.

Babcock & Davidson, for appellees, cited: *Pope v. Hooper*, 6 Neb., 181. *Schooley v. Romain*, 31 Md., 574. *Bank v. Beck*, 8 Kan., 660. *Wortendyke v. Meehan*, 9 Neb., 229.

MAXWELL, J.

This is an action to foreclose a mortgage upon real estate. The defense is usury. The plaintiff claims to be a *bona fide* purchaser of the notes and mortgage for value without notice, and before the maturity of the notes. On the trial of the cause the court made special findings: *First*. That the notes in question were given for an usurious consideration. *Second*. That the plaintiff purchased the notes in controversy in the regular course of business, in good faith, for a valuable consideration, and without knowledge or notice that they had been given for an usurious consideration, or that any prior note described in the mortgage had

been unpaid within thirty days after its maturity, except such notice as was given by the terms of the mortgage itself. The court also found that the terms of the mortgage charged the plaintiff with notice, and that he took the notes subject to the usurious consideration. The court also found that the payments heretofore made by the defendants upon the notes and mortgage in question fully paid the principal of the same, and that nothing was due the plaintiff. The action was therefore dismissed at the plaintiff's costs. The mortgage contains the following provision:

"It is hereby agreed that if this land, or any part thereof, is now or shall hereafter be sold for taxes, the said second party may redeem the same and add the cost of redemption, with agent's fees of ten per cent, to the debt hereby secured; also that if said land is hereafter sold for tax, or if the annual interest on any of said notes, or if any one of said notes remains unpaid for thirty days after maturity, this entire debt, all of said described notes, principal and interest, shall become immediately due and payable, and this mortgage may then be foreclosed." A stipulation of this kind, being the deliberate contract of the parties, will be enforced by a court of equity. *Pope v. Hooper*, 6 Neb., 178. *Fletcher v. Daugherty*, 13 Id., 224. *S. & M. R. R. Co. v. Lancaster*, 62 Ala., 555. *Railway Co. v. Sprague*, 103 U. S., 756. The provision, however, is for the benefit of the mortgagee, to enable him to procure the money loaned at the time it was agreed to be paid. If the mortgagee so desire, he may institute an action upon default to foreclose, and upon obtaining a decree have the premises sold. He need not do so, however. The stipulation being made for his benefit, he may waive it without putting himself in default. The credit as shown by the notes was to extend over a series of years. Interest was computed upon the basis of such extended credit, and notes given for the same. This was the real contract of the par-

ties—a loan of money to be repaid with interest in installments extending over a period of five years. Without this extended credit, the mortgagor, in many cases, would not incur the obligation, knowing his inability to meet the same from his ordinary resources. The payments therefore are adapted to his ability to pay. Good faith would seem to require in ordinary cases an adherence to these terms, unless there is willful neglect on the part of the mortgagor, from which the mortgagee may sustain loss. In our view, the provision is permissive merely—that in case of default the mortgagee *may* bring an action. Why should a court add to its terms by making it mandatory? The provision, while not strictly a penalty, is highly penal in its nature, and will not be extended by inference beyond the plain meaning of the words employed, and the intent of the parties is to be deduced from an examination of the entire instrument. We hold, therefore, that the provision is permissive and not compulsory, and that all the notes did not become due and payable upon a mere default in the payment of one of them, unless the mortgagee had elected so to declare by bringing an action to foreclose. It follows that the judgment of the court below must be reversed, and a decree will be entered in this court for the amount due the plaintiff.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	432
17	461
20	509
22	481
17	432
35	702
17	432
36	642
17	432
42	345
17	432
45	340
17	432
47	154
17	432
53	715
17	432
159	548
17	432
60	324

THE OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. MARY K. WALKER, DEFENDANT IN ERROR.

THE OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. E. T. HARTLEY, DEFENDANT IN ERROR.

THE OMAHA & REPUBLICAN VALLEY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. HENRY C. HARTLEY, DEFENDANT IN ERROR.

- 1. Railroad: EMINENT DOMAIN: APPEAL: TRIAL: ARGUMENT**
Where a railroad company has condemned real estate for right of way, and an appeal from the award of damages has been taken to the district court, the land-owner on the trial is entitled to open and close.
- 2. Instructions asked and refused or objected to must be specifically pointed out in some way in the motion for a new trial.**
- 3. Damages for Right of Way: JURY VIEWING PREMISES.**
Where, in a trial to recover damages for right of way across a tract of land, the jury were permitted by the court to view the premises, the verdict will not be set aside unless it is clear that the jury erred.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Harwood, Ames & Kelly, for plaintiff in error.

Lamb, Ricketts & Wilson, for defendants in error.

MAXWELL, J.

These cases were appealed to the district court of Lancaster county from the award of damages allowed by the commissioners appointed by the county judge of that county to

appraise the amount to which the defendants were entitled for the right of way for the railroad across their respective tracts of land. The sole question presented is the amount to which each of the defendants is entitled. The cases were tried to the same jury—practically one trial in the court below, and a verdict for a specified amount returned in favor of each of the defendants. Although there are three records, presenting each case separately, yet as the questions presented are substantially alike in all, except as to the amount of recovery, the cases will be considered together.

The first error relied upon, and the one on which the most reliance seemed to be placed, is the refusal of the court below to permit the plaintiff in error to open and close the case. In support of this proposition it is said in the plaintiff's brief that "under our laws and constitution, the land cannot be taken until just compensation is made; and when the petitioner and land-owner cannot agree in regard to the amount of compensation, the petitioner is compelled to institute proceedings to determine what shall be just compensation. To the petition which may be filed by the corporation to condemn the land for public use, no answer or plea of any character is required to be filed, but the amount to be paid for the property taken is to be determined upon the petition itself." Then, after quoting section 283 of the code, which provides that "the party who would be defeated if no evidence were given on either side must first produce his evidence; the adverse party will then produce his evidence," it is said: "The corporation would be defeated in the absence of evidence, because it is incumbent upon it to establish affirmatively, either that the award of the commissioners is full 'just compensation,' or else, that some other sum is, which it attempts to establish by testimony, and that upon payment or tender of it the road may be lawfully built and operated upon the land," etc. No case is cited to sustain the plaintiff's position.

In *Vifquain v. Finch*, 15 Neb., 505, the plaintiff claimed

the right to open and close upon the ground that he had admitted the publication and justified. Malice, however, was denied, and it was held that the plaintiff in the action was entitled to the opening and closing.

The same ruling was had in *Fry v. Bennett*, 3 Bosw., 200. In that case, it was held that the amount of damages is a matter in issue, and, when proof of facts not admitted in the answer is admissible on that question, the defendant is not entitled to the opening and closing.

In determining which party is to begin and close, if anything is left for the plaintiff to show affirmatively, the right to commence and close is with him. *Chesley v. Chesley*, 37 N. H., 229. *Lexington v. Paver*, 16 Ohio, 330. *Heilman v. Shanklin*, 60 Ind., 443. *Tull v. David*, 27 Id., 377. If the plaintiff has any proof to offer as to damages, or otherwise to entitle him to recover, he is entitled to open. *Huntington v. Conkey*, 33 Barb., 218. *Graham v. Gautier*, 21 Texas, 111. *Perkins v. Ermel*, 2 Kas., 325. And this was the rule at common law.

In *Lacon v. Higgins*, 3 Stark, 178, the defendant had pleaded coverture, without the general issue, in assumption for goods sold. In a previous action for a similar cause, on a plea of non-joinder of one Cohen, the plaintiff being allowed to begin, it was insisted that he should give all his testimony as to Cohen; but Abbott, Ch. J., said, "The plaintiff does not know who Cohen is, except from the plea. He cannot meet the case till he is acquainted with it." *Stansfield v. Levy*, Id., 8.

In note 223 to 1 Phillips on Ev. (4th Am. Ed.), 817, the rule is stated as follows: "The parties have been and still are generally governed by the *onus probandi*, as indicated by the record; the plaintiff beginning and having the right of reply in all cases where the defendant's pleadings or any part of them deny the whole or any part of the plaintiff's pleadings, so as to leave any single affirmative allegation on his side to be established by proof. Per

Williams, J., in *Comstock v. Hadlyme*, 8 Conn., 261, cases there cited. Per Parker, Ch. J., in *Brooks v. Barrett*, 7 Pick., 99. *Browne v. Murray*, 1 Ry. & Mood., N. P. Cas., 254. On the other hand, where the form of the defendant's answer is such as to admit all the plaintiff's averments, or leave him nothing to prove, the defendant is to begin and close the case."

These rules are substantially those of the code. To entitle the defendant to open and close, he must admit the plaintiff's claim, so that it will not be necessary to introduce evidence to sustain it. He may then set up any defense, counter-claim, or set-off he may have. In other words, he must confess the cause of action, but may plead matters in avoidance or for affirmative relief. When a railroad corporation condemns land for right of way, the constitution and statute provide that just compensation to the land-owner shall be made. Const., Art. I., § 21. Comp. Stat., Ch. 16, § 81. The law authorizes the company to go upon the land, but provides that the damages sustained thereby by the land-owner shall be paid. Comp. Stat., Ch. 16, § 95. The railroad company admit having taken the land, but do not admit any specific amount of damages. In the absence of proof the land-owner could take judgment for no sum whatever, and would fail in the action. We have no doubt, therefore, that the land-owner is entitled to open and close, and this has been the general rule in the courts of this state. The first assignment of error, therefore, is not well taken.

The 2d, 3d, 4th, 5th, 6th, and 7th assignments of error relating to the instructions cannot be considered, as the objections were not made in the motion for a new trial. *Cleveland Paper Co. v. Banks*, 15 Neb., 23. *H. & G. I. R. R. v. Ingalls*, Id., 129.

The 8th assignment is, that the damages are excessive. At the request of the plaintiff in error the jury were permitted under proper restrictions to view the right of way

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across the lands of the several defendants, and in what way they were damaged by the location of the road. Where this is permitted it is difficult to review the judgment as being against the weight of evidence, because all the evidence before the jury—the view of the premises—cannot from the nature of the case be incorporated in the record, and in these cases there is no such discrepancy between the evidence in the record and the verdict as to justify the court in setting them aside, which the court would not do unless it was clear that the jury had erred. The judgments, therefore, must be affirmed.

JUDGMENTS AFFIRMED.

THE other judges concur.

EX PARTE E. F. DAVIS.

Arrest and Bail: AFFIDAVIT: HABEAS CORPUS. Where the facts and circumstances stated in the affidavit upon which an order of arrest is obtained, in arrest and bail, tend to show that the defendant fraudulently contracted the debt to recover which the action is brought, he will not be discharged on habeas corpus upon the ground that the affidavit is insufficient.

ORIGINAL application for habeas corpus.

E. W. Thomas and A. Schoenheit, for applicant.

Frank Martin, contra.

MAXWELL, J.

The petitioner was arrested in proceedings in arrest and bail, Civil Code, Title VIII., Chap. 1, and now seeks to be discharged on habeas corpus upon the ground

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that the affidavit for his arrest is not sufficient to justify the arrest. The affidavit is as follows: "James M. Anthony being first duly sworn, says that he is the duly authorized agent of the above named plaintiff, Amos Whitely, president of the Champion Machine Co., that said plaintiff has commenced an action in said court against the above named defendant, Ed. F. Davis, to recover from him the sum of four hundred and twenty-nine dollars and twenty-two cents (\$429.22), upon four several promissory notes; that said claim is just, and there is now due thereon the sum of \$429.22. Affiant further says that the defendant fraudulently contracted the debt for which said suit is now brought, in the following manner: That is to say: On the 23d of January, 1884, and for some time prior thereto, and for several months after, said defendant was engaged in the business of selling agricultural implements at the city of Falls City, in said county and state, and the said Champion Machine Co. was engaged in the manufacture of agricultural implements. That said defendant in order to get possession of a large amount of such machinery from said plaintiff company upon credit, and to defraud said company out of the value of the same, on the 23d day of January, 1884, at said Falls City, in said county, stated and represented to the agent of said plaintiff, in writing (and then and there signed said statement), that he, said defendant, possessed and was the owner of personal property of the actual value of \$7,250, as follows: One frame warehouse, of the value of \$600; a stock of implements in said Falls City, worth \$3,000; twenty-six Turnbull wagons, worth \$1,550; good and collectible notes due said defendant from individuals, amounting to \$1,500; good and collectible accounts due from individuals amounting to \$350; and cash on hand and in bank, subject to the check of said defendant, \$250; and that the defendant on that date owed only the sum of \$1,487. A copy of said statement is hereto attached and

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made a part hereof and marked 'A.' And relying upon said statement and representations so at that time made, said Champion Machine Company sold and delivered to said defendant its machinery and implements to the amount and value of \$1,775.50, and took the individual promissory notes of said defendant for the whole of said sum, payable to its president, said Amos Whitely, and the notes sued on in said action are a part of said transaction, and the only notes yet due under said contract, except the first installment of said amount, which came due in October, 1884, and was paid by said defendant, and amounted to about \$420. The remainder of said notes given at that time are not yet due, except the ones sued on herein, and no part of said sum of \$1,775.50 has been paid except as above mentioned. That the second installment of said notes became due on the first and fourth days of February, 1885. Affiant further states that said statement was false in this, that said warehouse was not of the value of \$600, and said stock of implements and wagons were not worth the sum of \$4,550, and said statement of the indebtedness at that time exceeded the sum of \$2,487, and the said defendant did not have in bank the sum of \$250 as stated; all of which was to said defendant at the time well known, and so by him wrongfully and fraudulently made for the purpose of misleading, deceiving, and cheating said company, and procuring their property without paying for the same. That a few weeks before the second installment of the notes given for said property became due, said defendant falsely and fraudulently pretended that he had failed in business and was unable to pay his creditors, and confessed judgment in favor of some of his creditors to the amount of about \$1,400, and gave up to them a small amount of personal property to be sold on execution, and falsely and fraudulently pretended that he had given up all of his property. That the property so by him surrendered to some of his other creditors aforesaid has been sold on execution

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and realized only about the sum of \$776, no part of which has been paid to or applied on the notes sued on herein or any of the notes given in said transaction.

"Affiant further avers that said defendant has property or rights in action which he fraudulently conceals, and alleges the following facts in support of this charge, to-wit: Affiant avers that on the 23d day of January, 1884, said defendant, for the purpose of obtaining a large amount of goods from the said Champion Machine Company as above alleged, made the statements and representations above mentioned, and contained in the paper hereto attached and made part hereof, marked 'A.' That it appeared from said showing that at that time said defendant was the owner of personal property then in his possession in said county of the amount and value of \$7,200, and that his total indebtedness at that time was only of the sum total of \$1,487. That solely upon the faith and credit of that statement, representation, and showing, the said Champion Machine Company sold to him on credit, and delivered to him about March 20, 1884, goods, wares, and merchandise upon credit as aforesaid, to the amount and value of \$1,775.60, making his assets according to his said statement \$9,026. That said defendant received and sold the whole of said goods, wares, and merchandise so received on said statement during the summer of 1884 for more than \$2,000, and has only paid the first installment of said notes which came due in October, 1884, and amounted to only about \$420. That the second installment of said notes came due about February 1st, 1885; and about January 1st, 1885, said defendant pretended to fail in business and be unable to pay his debts, and about January 20, 1885, confessed judgment for sundry other creditors, amounting to about \$1,400, and claimed and pretended to turn out to his said creditors to be sold on execution on said judgments all of his property; and that the whole of the property so surrendered by him to his said judgment creditors was

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sold on execution and only realized about \$776. That the homestead of said defendant was in the name of his wife, and worth about \$2,000, and was not scheduled nor included in the statement annexed. That said defendant himself has contracted to convey said homestead to one William Hoppe at the agreed valuation of \$1,900, and take in payment 174 acres of land in Nemaha county, Kansas, at the agreed valuation of \$3,000, said farm being incumbered to the amount of \$1,100, which incumbrance said defendant has assumed and agreed to pay. That said homestead is incumbered to the amount of about \$300, which said defendant has contracted to pay before said trade shall be definitely consummated. That said farm is unimproved, except that there is about fifty-five acres in cultivation on it. That defendant is now making his arrangements to remove with his family to said farm and reside on it, and that he is intending to fence said land, build a house on it, and make other improvements thereon at once. All of which will involve the expenditure of considerable sums of money, as well as the payment of the mortgage on said homestead. Notwithstanding which fact said defendant has claimed and pretended to affiant and others, and still does claim and pretend, that he had neither money nor property with which to pay or secure the claim of plaintiff or any part thereof. Affiant has repeatedly requested defendant to exhibit his books of accounts so that affiant could see what had become of his property and money, but defendant always refused to do so, or make any showing whatever as to what had become of his money or property. That just before defendant pretended to fail, and in the month of January, 1885, he (defendant) took out of his stock of implements the following described articles, to-wit: One corn drill, two iron beam Sterling plows, one riding sulky plow, one walking cultivator, one corn sheller, one corn planter, one wheat drill, one harrow; and stored the same in a barn about a mile from the city

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of Falls City, and about two miles from his residence, and neither surrendered them to his creditors, nor informed his creditors of their existence or whereabouts. And affiant says that it was the intention of said defendant to allow said machinery to remain so stored and secreted until he would have an opportunity to remove the same to his said farm in Kansas. Affiant further says that said defendant from the 23d of January, 1884, to January 1, 1885, was engaged in a profitable business, and made money therein, and, so far as affiant can learn, met with no losses or reverses of any kind. Affiant therefore asks that an order of arrest may issue against said defendant, and that he be held to bail in the sum of \$858.44.

"JAMES M. ANTHONY.

"Subscribed in my presence and affirmed to before me this 12th day of March, 1885.

"J. B. COUPE,
"County Judge."

This application is in the nature of a demurrer to the facts stated in the affidavit. That is, do the facts stated *prima facie* show that the petitioner fraudulently contracted the debt? There is very much in the affidavit that is unnecessary; but stripped of all surplusage the facts stated amount to this: That in order to induce the Champion Machine Co. to sell him goods on credit, the petitioner, in January, 1884, made a detailed statement to them in writing of the total amount of his assets and debts, from which it appeared at that time the total amount of his assets was the sum of \$7,250, and of his debts, \$1,487. That upon receiving this statement, the company relying upon it sold him goods to the amount of \$1775.76 upon credit, making his total assets more than \$9,000. It is also alleged that from the time the statement was made until January 1st, 1885, the petitioner "was engaged in a profitable business, and made money therein;" and so far as the

affiant could "learn had met with no losses or reverses of any kind." The facts stated in the affidavit certainly tend to prove that the petitioner fraudulently contracted the debt. If on the 23d of January, 1884, his assets amounted to more than \$7,000, which were further augmented by the value of the property received from the plaintiffs and sold, why was he unable to pay his debts on the 1st day of January, 1885? The natural inference is, that he misstated the amount of his property or concealed the amount of his debts. In either case a material misstatement of fact as to the financial ability of the debtor made for the purpose of procuring credit, and in reliance upon which it was obtained, may, if the debtor is insolvent, be sufficient to authorize his arrest upon the ground that he fraudulently contracted the debt. In such case where the affidavit upon which the arrest is based states facts, the legal tendency of which is to make out a case in all its parts, showing that the debt was fraudulently contracted, although the proof may be slight and not entirely satisfactory, the arrest will be valid until set aside by a direct proceeding for that purpose. *Miller v. Brinkerhoff*, 4 Denio, 120. *Ex parte Smith*, 16 Ill., 347. *Stone v. Carter*, 13 Gray, 575. *Nelson v. Graydon*, 3 McLean, 326. *Parker v. Follensbee*, 45 Ills., 478. *Wade v. Judge*, 5 Ala., 130. *Spice v. Steinruck*, 14 O. S., 213. That is, if there is a total failure to state in the affidavit the essential facts necessary to authorize the issuing of the order of arrest it will be void for want of jurisdiction to issue it. *Loder v. Phelps*, 13 Wend., 48. *Gorton v. Frizzell*, 20 Ill., 291. *Whiting v. Trafton*, 16 Me., 400. *Smith v. Bouchier*, 2 Stra., 993. But where the affidavit has a legal tendency to make out a proper case in all its parts the order is not void nor the imprisonment under it unlawful. The law requires a debtor to act in good faith with his creditors, both in obtaining credit and in applying his property to the payment of his debts. The affidavit in this case states facts sufficient

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to require the petitioner to show that he has done this. The writ must therefore be denied.

WRIT DENIED.

REESE, J., concurs. COBB, CH. J., dissents.

GEORGE S. HURFORD ET AL., PLAINTIFFS IN ERROR,
V. LUTHER B. BAKER, DEFENDANT IN ERROR.

17	443
40	308
17	443
48	739

1. **Summons.** The language used in the summons wherein the defendants are notified that unless they answer *by* the 24th day of March, etc., *Held*, Equivalent to the language of the statute, which is, that they "answer *at* the time stated therein," etc., and sufficient.
2. **Jurisdiction: WAIVER.** By bringing a cause to the supreme court on error, a defendant in the court below waives all questions of the jurisdiction of such court over his person.
3. **Practice in Supreme Court.** No point of error not brought to the attention of the trial court for its ruling nor necessary to be considered and passed upon by it in order to reach the judgment rendered will be considered by this court in a proceeding in error.

ERROR to the district court for Madison county. Heard below before CRAWFORD, J.

James T. Brown, for plaintiffs in error.

Brome & Durland, for defendant in error.

NOTE.—Appeal gives jurisdiction of the person of appellant whether the lower court had acquired it or not. *Brondberg v. Babbott*, 14 Neb., 519. An appeal from or petition in error to the district court is a waiver of all errors which have intervened in service or return of process necessary to bring a party within the jurisdiction of that court. *Shawang v. Love*, 15 Neb., 143.

COBB, CH. J.

Action by the defendants in error against the plaintiffs in error, George S. and Kate F. Hurford, to recover the contents of a certain promissory note executed by them, and to foreclose a mechanic's lien on certain premises for lumber and other building material furnished them for the erection of a dwelling-house thereon, and for which the said note was given. Gerhardt Schmidt was made a defendant in said action as the holder of a prior mortgage lien on the said premises. Neither of the defendants answered. Their default was entered, and upon proper proceedings judgment was taken against them as prayed in the petition. George S. and Kate F. Hurford bring the cause to this court on error.

The following errors are assigned :

1. The said court had no jurisdiction over the person of the plaintiffs in error.
2. The court erred in rendering a greater judgment than was endorsed on the summons in the cause.
3. The court had no jurisdiction to render the judgment rendered in the cause.
4. That the summons in this cause is contrary to law, in that it requires the plaintiffs herein (defendants) to answer by a certain day when it should in law have been on or before said day.
5. That the endorsement on the said summons in said cause stated if plaintiffs herein (defendants) failed to appear, said defendant (plaintiff) would take judgment for \$375 and interest from February 5, 1884, whereas a greater and a different judgment was rendered.
6. The court erred in rendering judgment against plaintiffs herein, George S. Hurford and Kate F. Hurford.

Plaintiffs in error, by their brief, urge but two of the above errors, and this opinion will be confined to them.

First, as to the question of jurisdiction. The summons to which objection is made commands the sheriff to notify the defendants (naming them) "that they have been sued by Luther B. Baker in the district court of said county; that unless they answer by the 24th day of March," etc. The language of the statute (sec. 64 of the civil code) applicable to the subject is as follows: "It shall be directed to the sheriff of the county and command him to notify the defendant or defendants named therein that he or they have been sued and must answer the petition filed by the plaintiff, giving his name, at the time stated therein," etc. There is no difference in the meaning of the two sentences. If there is, then it must be confessed that while the idea is exactly the same it is better expressed by the language of the summons than that of the statute. It has never been doubted that an answer filed before the answer day, and after the service of the summons, is equally as good as though filed at or on the answer day. I think that a notification in language that admits only of a meaning which has always been accorded to the language of the statute must be held sufficient. While upon this point I will add, that by bringing the cause to this court on error the plaintiffs submit to the jurisdiction of the district court and waive any question of the irregularity of the summons or its service, as has been often held by this court. See also *Adams Express Co. v. St. John*, 17 O. S., 641.

2. The summons in the case had thereon the following endorsement: "Amount claimed of the defendant by the plaintiff is \$375 and interest from Feb. 5, 1884," signed by attorneys for plaintiffs. There being no appearance on the part of the defendants the plaintiff took judgment for the amount named in the notice, and also for the foreclosure of a mechanic's lien and sale of premises.

This was undoubtedly an irregularity on the part of the plaintiff, but it cannot be said to be an error on the part of the court. To make it such, the attention of the

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court must have been called to it by motion or other appropriate proceeding and its ruling taken thereon. It is upon such ruling, if wrong, that error will lie.

There was no motion for a new trial in the court below, nor application in any form to correct the judgment, and it is improbable that the court ever had knowledge that the summons was endorsed. It was guilty of no neglect of duty in failing to examine the summons to see whether it was endorsed, and, if so properly endorsed, to authorize the judgment prayed for in the petition.

It may be suggested that the case at bar being in the nature of an equitable proceeding, and having been tried to the court without the intervention of a jury, no motion for a new trial was necessary. Such, I think, would be the case if the errors relied upon consisted in the ruling or decision of the court on matters in issue or necessary to be considered and passed upon by the court in order to reach the judgment rendered, but certainly not when they consist of matters like that which we are now considering.

The first point having been waived by bringing the case upon error, and the second not being based on any act or decision of the court below, it is not deemed necessary to notice the point made by defendant in error.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

FRED. S. JOHNSON ET AL., PLAINTIFFS IN ERROR, V.
JACOB GREIM, DEFENDANT IN ERROR.

17	447
37	448
17	447
42	100

Trial: MISCONDUCT OF PARTY. When a jury was sent in charge of a bailiff of the district court, with the sheriff and county surveyor, a distance of eight miles to view and examine real estate alleged to be damaged by the overflow of water, and while examining the land, it being noon, the bailiff, by order of the sheriff, procured and caused dinner to be served at the house of defendant in error, without his solicitation or the solicitation of the jury—there being no other convenient place to procure it—the dinner being obtained by the bailiff, to be paid for by him, and where, in such case, it was affirmatively shown that defendant in error had no conversation with the jury upon the subject of the case on trial, it was *Held*, That no misconduct on the part of the defendant in error or of the jury was shown which would require a new trial.

ERROR to the district court for Seward county. Tried below before POST, J., sitting for NORVAL, J.

R. S. Norval, for plaintiffs in error.

D. C. McKillip, for defendant in error.

REESE, J.

There is but one question involved in this case. The question for trial in the district court was the amount of damages suffered by defendant in error by reason of the overflow of his land along the course of a stream—occasioned by the construction of a mill-dam by plaintiffs in error. Upon the trial the jury were sent to view the land. The distance was about eight miles. After their return they were instructed by the court, and, after consideration, returned a verdict assessing the damages at eighty dollars. Plaintiff in error then moved for a new trial, assigning among other grounds therefor the misconduct of the de-

defendant in error in giving and of the jury in receiving a dinner at the house of defendant in error. The motion was supported by the affidavit of the attorney of plaintiff in error based upon information from the jurors. Counter affidavits were filed by the defendant in error and by the bailiff who accompanied the jury. The motion for a new trial was overruled, and a judgment entered upon the verdict of the jury. Plaintiff in error assigns this ruling for error in this court.

From the affidavits submitted upon the hearing of the motion, the district court could properly find the facts to be that the sheriff, bailiff, county surveyor, and jury went to the premises of defendant in error. While there, it being noon, the sheriff ordered the bailiff to procure dinner for the jury and officers. They all went to the house of defendant in error, upon the land, for that purpose. Defendant in error refused to allow the jury to eat at his house, but upon being assured by the sheriff that no harm could result, he proposed leaving the house while the jury remained. He was again informed that such action was not necessary, but that he should refrain from any conversation with, or in the presence of, the jurors upon the subject matter submitted to them. There was no other convenient place where the bailiff could provide dinner for the jurors and officers, and under the direction of the sheriff he procured it as he would "have taken them to a hotel, expecting to pay for it." The bailiff had the jury in charge at all times, and defendant in error was not with them and had no conversation with them except while at dinner, and then not upon any matter connected with the case on trial.

The district court could, and perhaps did, find that the dinner was not furnished the jury by the defendant in error. They were under the charge of the officer accompanying them. He had been instructed to provide food for them. He did so. Had it been convenient for him to have procured it elsewhere he should have done so. But

it was not. The jury were placed under no possible obligations to defendant in error. It being the duty of the bailiff to provide them with food, it was of no concern to them as to where or of whom he procured it. The evidence shows that defendant did not go with the jury to the land, nor speak to them about it.

The case of *Ensign v. Harney*, 15 Neb., 330, is relied upon by plaintiff in error as a case in point, and it is insisted that the rule stated in that case must result in a reversal of the judgment in this case. But such is not our view. It that case a favor was received by the juror directly from the counsel of one of the parties, and the court says, "to permit him to accept favors from either party was to put him under obligations to such party, the tendency of which was to bias his judgment." As we have seen, the rule there laid down has no application to the case at bar. There was no misconduct on the part of defendant in error. It is not shown that he furnished the dinner to the jury or caused it to be furnished. There was no misconduct on the part of the jury for they received no favors at the hands of defendant in error. No undue or improper influence was exerted over them, and they were not in a position which made them liable to such influence. *Wilson v. Abraham*, 1 Hill, 210. *Hilliard on N. T.*, 204, § 8.

No error appearing in the record, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	450
26	675
17	450
34	80

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V.
THOMAS DOBSON, DEFENDANT IN ERROR.

1. **New Trial after Judgment: PETITION: ALLEGATIONS.**
In a petition for a new trial under section 318 of the civil code, on the ground of the misconduct of the jury and the successful party, where the petition is not filed for more than ten months after the return of the verdict and four months after judgment was rendered on the verdict, it is not sufficient to allege that the plaintiff "could not with reasonable diligence have discovered or ascertained the misconduct" sooner. The petition should state the facts showing what efforts have been made to discover the misconduct, or failing to do so, facts should be stated which would excuse the making of such efforts.
2. **Occupying Claimants.** Whether in case of the assessment of the value of improvements under section five of the act of 1883, entitled "An act for the relief of occupying claimants," etc., the remedy is exclusive and the failure to object to the verdict of the appraisers within the time fixed by said section is a waiver of the right, *quære*.

ERROR to the district court for Seward county. Tried below before POST, J., sitting for NORVAL, J.

Marquett & Deweese and *R. S. Norval*, for plaintiff in error.

William Leese and *H. H. Blodgett*, for defendant in error.

REESE, J.

The original action, out of which the present proceeding has grown, was commenced by the plaintiff in error against defendant in error for the possession of real estate of which defendant in error was then in possession. Such proceedings were had as resulted in a judgment in favor of plaintiff in error. The cause was removed to this court for review, and at the January term, 1882, the judgment of the

district court was affirmed. By some oversight no opinion was filed, and the case is not reported. After the return of the mandate to the district court, on the twenty-seventh day of April, 1882, defendant in error, under the provisions of the act then in force known as "An act for the relief of occupying claimants of lands," Compiled Statutes, 1881, 365, filed a request that a jury be impaneled for the purpose of assessing and determining the value of the improvements placed upon the land by him. The order was made and the jury impaneled. On the seventh day of June, 1883, they returned into court a verdict in favor of defendant in error for the sum of \$465.80. On the eighth day of December, 1883, judgment was rendered on the verdict of the jury in favor of defendant in error for the amount found due him. On the twenty-second day of March, 1884, plaintiff filed its petition in the district court, alleging substantially the above facts and the further facts that, while the jury were upon the land making the necessary examination, they, without the knowledge or consent of plaintiff in error, were taken by the officers having them in charge and by defendant in error to the house of defendant in error, and while there fed, drank, and lodged by defendant in error in his house and with his family during one night, and that during said time and during the deliberations of the jury the defendant in error conversed with each of the jurors concerning the matters upon which they were to decide, etc. It is alleged that by reason of this misconduct upon the part of the jury and the defendant in error the finding of the jury was excessive and much above what it ought and otherwise would have been. Also that plaintiff in error was unable to ascertain the facts alleged until a few days before filing the petition, and that it could not with reasonable diligence have ascertained the facts sooner.

The prayer of the petition is that the judgment and verdict be set aside and a new trial granted.

To this petition a general demurrer was interposed by defendant in error, which was sustained by the district court, and plaintiff in error excepting to the decision of the court declined pleading further, and the petition was dismissed. This ruling of the district court is assigned for error in this court.

The question presented by this record is, whether or not the plaintiff in error by its petition has brought itself within any of the provisions of the statute providing for the granting of new trials. To recapitulate the facts stated in the petition, we observe that on the seventh day of June, 1883, the verdict of the appraisers was filed in court; on the eighth of December of the same year, judgment was rendered, and on the twenty-second day of March, 1884, the petition for a new trial, on the ground of the misconduct of the defendant in error and the jury, was filed.

Section 314 of the civil code provides that new trials may be granted by the court in which a trial was had in the following cases: *First.* Irregularity in the proceedings of the court, jury, referee, or prevailing party, or any order of the court or referee, or abuse of discretion, by which the party was prevented from having a fair trial. *Second.* Misconduct of the jury or prevailing party. *Third.* Accident or surprise which ordinary prudence could not have guarded against. *Fourth.* Excessive damages appearing to have been given under the influence of passion or prejudice. *Fifth.* Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon contract, or for the injury or detention of property. *Sixth.* That the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law. *Seventh.* Newly discovered evidence, material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial. *Eighth.* Error of law occurring at the trial and excepted to by the party making the application.

Section 316 is as follows: "The application for a new trial must be made at the term the verdict, report, or decision is rendered, and except for the cause of newly discovered evidence material for the party applying, which he could not with reasonable diligence have discovered and produced at the trial, shall be within three days after the verdict or decision was rendered unless unavoidably prevented.

Section 317 provides that the application must be upon grounds stated in a written motion, and that where the application is made for the causes stated in either subdivisions two, three, or seven of section 314 it must be sustained by affidavits showing their truth.

Section 318 provides that, "Where the grounds for a new trial could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee, or decision was rendered or made, the application may be made by petition filed as in other cases; on which a summons shall issue, be returnable and served or publication made as prescribed in section seventy-nine. The facts stated in the petition shall be taken as denied without answer, and if the service shall be complete in vacation the cause shall be heard and summarily decided at the ensuing term * * *"

It is quite apparent that if plaintiff in error has brought its case under any of the provisions of the sections above quoted it is section 318. It is perhaps true that this section is not limited to newly discovered evidence, as is claimed by defendant in error, but we think it is unquestionably true that the same showing of diligence is required when the grounds upon which the new trial is asked are other than newly discovered evidence as would be in that case. And we think the bare allegation, as in the petition in this case, that the plaintiff in error "could not with reasonable diligence have discovered or ascertained the said misconduct" is not sufficient. "He should negative every cir-

cumstance from which negligence could be inferred." *Axtell v. Warden*, 7 Neb., 189. The allegation above quoted is a conclusion rather than the statement of the facts by which that conclusion could be reached. *Tomer v. Densmore*, 8 Neb., 389. "The party must state in his petition facts which, if admitted to be true, constitute sufficient grounds to grant a new trial." *Id.* No reason is shown why the alleged facts might not have been discovered between the 7th day of June, 1883, the date of the rendition of the verdict, and the 8th day of December of the same year, the date of the judgment, nor at an earlier day than the 22d day of March, 1884, the date of the filing of the petition. For aught that appears in the petition, and the fact undoubtedly was, that the discovery might, with diligence, have been made immediately upon the return of the verdict. It may be suggested that the demurrer of defendant in error admitted the allegation as made, and that for the purposes of the decision on the demurrer that was sufficient. To this it could be replied that the demurrer only admits what is well pleaded and the petition receives no aid from the technical admission. *Id.*, 190.

It is claimed by defendant in error that the remedy presented by section five of the act of 1883 entitled "An act for the relief of occupying claimants," etc., Laws 1883, 252 (Comp. Stat., Second Edition, Chap. 63), is exclusive, and that the plaintiff in error having failed to avail itself of the remedy provided by that section has thereby waived the right sought to be enforced by this proceeding. This section provides that "if either party shall think himself aggrieved by the appraisement he may file objections thereto at the term to which the same is returned, if returned in term time ten days before the term adjourns, and if such report is made in vacation, or if made in term time, less than ten days before the term adjourns, then such objection may be filed on or before the second day of the term next ensuing." This act was in force at

B. & M. R. R. Co. v. Dobson.

the time of the appraisalment, and by its terms (section 11) it applies to all suits pending at the time it took effect. If the position of defendant in error in this is correct, the extreme limit of time in which to make the application was the second day of the December, 1883, term of the district court. But as it is clear that the demurrer was properly sustained upon any view of the case, it is not necessary to decide this question.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V.
THOMAS DOBSON, DEFENDANT IN ERROR.

17 435
19 451
19 453

Occupying Claimants: ASSESSMENT OF DAMAGES: In an action against D., an occupant, for the possession of real estate, judgment was in favor of the plaintiff. D. removed the cause to the supreme court for review by proceedings in error, where the judgment of the district court was affirmed. After the filing of the mandate from the supreme court, in the office of the clerk of the district court, and at the first term thereafter, the defendant filed a request for a jury to assess the value of lasting improvements made upon the land. *Held*, That the request was made within time—and not too late—and that the district court did not err in ordering the jury to be impaneled.

ERROR to the district court for Seward county. Tried below before POST, J., sitting for NORVAL, J.

Marquett & Dewese and *R. S. Norval*, for plaintiff in error.

William Leese, for defendant in error.

REESE, J.

This case was originally an action of ejectment instituted by plaintiff in error against defendant in error in the district court of Seward county. In that action plaintiff in error was successful. The cause was removed into the supreme court by proceedings in error by defendant, and being affirmed, a mandate issued to the district court commanding it to proceed in the enforcement of the judgment. This mandate was issued the 11th day of March, 1882, and filed in the office of the clerk of the district court on the 15th day of the same month, in vacation. On the 27th day of April following, and during the regular April term of the district court, the defendant in error filed and presented to the court a request that a jury be impaneled to determine the value of the lasting improvements made upon the land by defendant in error under the provisions of the law for the relief of occupying claimants of lands. Compiled Statutes 1881, page 365. The court at that time refused to make the order for the jury, but over the objection of defendant continued the cause until the November term of court for that year, and ordered notice to be given to plaintiff in error. The notice was served on plaintiff on the 26th of May, 1882. No proceedings appear to have been had until the 24th day of June, 1883, when the order for a jury was made and the jury impaneled.

The principal and so far as we are able to discover the only question presented by this record, no briefs having been filed, is, that the district court had no jurisdiction or authority to order the jury for the purpose of determining the value of improvements; that the final judgment in the ejectment proceedings having been rendered in May, 1880, and the defendant having elected to contest the judgment in the supreme court, it was too late, after an adverse decision in this court, for defendant to ask a jury for the purpose named.

From the record before us it appears that at the first term of the district court after the receipt of the mandate by the clerk the application for the jury was made.

In *Buchanan v. Dorsey*, 11 Neb., 373, it was held that no step should be taken by an unsuccessful claimant for the appraisement of the value of improvements until after a final judgment had been rendered in the action of ejectment. And that he could not be permitted to question the correctness of such judgment after asking and receiving the appraisement of the value of his improvements by a jury. Having done so he would be estopped from seeking relief against the judgment by proceedings in error.

By section three of the law in force at the time of the filing of the request it is provided that, "The court rendering judgment in any case provided for by this act against the occupying claimant, shall, at the request of either party, cause a journal entry thereof to be made, and thereupon a jury shall be impaneled by the court in the usual manner provided by law in civil causes." Compiled Statutes, 1881, 366. By section three of the law in force at the time the order was made it is provided in substance that the court rendering the judgment or decree against an occupying claimant shall, at the request of such occupant or claimant, issue an order to the sheriff commanding him to summon three disinterested persons, freeholders, etc., whose duty it shall be to appraise the real estate and the improvements, etc. Laws 1883, 351. Compiled Statutes, Second Edition, 1885, Ch. 63. It does not seem that time is made an *essential* element by either section. The court rendering the judgment is required, upon application, to make the order; but we do not think that it necessarily follows that it must be done at the same *term* at which the judgment is rendered. The right of the appraisement is given by the statute upon demand. The right to be heard in the court of last resort is given by the constitution. Bill of Rights, § 24. He may waive

his right to be heard in the court of last resort, if he so elects, and treat the judgment as final by causing the jury to be impaneled; but we know of no law which requires him to do so in order to enjoy the benefits of the occupying claimant's law. The district court had not lost jurisdiction of the cause. The mandate required the enforcement of the judgment. At the time the mandate was filed the court stood in the same relation to the case, so far as its jurisdiction was concerned, as it did immediately after the rendition of the judgment. The act of 1883 took effect February 23d of that year. The jury was ordered on the 4th day of June of the same year. By section 11 of the act it is made to apply to all suits pending at the time it took effect. All proceedings after the 23d of February, 1883, were under the new law. The cause was then pending. The request for the jury was made at the first opportunity after the receipt of the mandate, and was made at the proper time.

We have examined the record and find that all the proceedings in the case were at least in substantial accordance with the law, and see no reason why the judgment should not stand. It is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

OMAHA, NIOBRARA & BLACK HILLS RAILROAD COMPANY, PLAINTIFF IN ERROR, V. JACOB UMSTEAD AND MAGGIE UMSTEAD, DEFENDANTS IN ERROR.

17	459
17	461
17	463

Railroads: APPEAL FROM ASSESSMENT OF DAMAGES FOR RIGHT OF WAY: TRIAL IN DISTRICT COURT. Where an appeal is taken from the appraisement of damages to real estate caused by the construction of a railroad, the owner of the land becomes the plaintiff in the district court to the extent that it becomes necessary for him to prove his damage in case the railroad company, appellant, fails to appear for trial. In such case, when the railroad company is appellant, it is error to dismiss the appeal for the reason that the appellant company is in default for want of an answer.

ERROR to the district court for Nance county. Heard below before POST, J.

A. J. Poppleton and *J. M. Thurston*, for plaintiff in error.

W. F. Critchfield, for defendants in error.

REESE, J.

Plaintiff in error, by proper proceedings, condemned the real estate of defendants in error for right of way for its railroad. From the assessment of damages plaintiff in error appealed to the district court. At the next succeeding term of court an order was made upon the application of plaintiff in error, fixing the time in which to file pleadings. Defendants in error filed their petition within the time fixed by the court, but plaintiff in error failed to file its answer. At the session of court next after the one in which the order was made, plaintiff in error being still in default for want of an answer, defendants in error moved to dismiss the appeal for the reason that plaintiff in error had failed to comply with the order of the court

requiring it to answer within sixty days from the entry of the order as required thereby. This motion was sustained and the appeal dismissed, to which plaintiff in error excepted. This ruling of the district is now assigned for error.

No question is presented involving the legality of the appeal, either from not having been taken within the time required by law or as to the proceedings adopted in perfecting it. These questions were passed upon by the district court and decided in favor of plaintiff in error, and as defendants in error have taken no measures to have the decision reviewed it must be treated as final.

The only question then presented is, whether or not the decision of the court in dismissing the appeal was correct. This question involves one of practice in cases of appeals from the assessment of damages. Section 97, chapter 16, Compiled Statutes, provides that either party shall have the right to appeal from the assessment to the district court of the county where the lands are situated, if such appeal be taken within sixty days. It is further provided that the appeal shall not delay the work in the construction of the road, provided a sum equal to the amount of damages assessed is deposited with the county judge. This is substantially all we have in the statute upon this subject. It has been decided by this court that no appeal bond is required, and that it is not necessary to file pleadings in the district court. *Neb. Ry. Co. v. Van Dusen*, 6 Neb., 160. But if other issues than the mere question of damages are to be tried, then such issues must be presented by proper pleadings. *R. V. R. R. v. Hayes*, 13 Neb., 491. *Gerrard v. O. N. & B. H. R. R.*, 14 Id., 271. The appeal, when tried without pleadings, presents only the question of damages.

In the case at bar an order requiring the issues to be formed was made upon the application of plaintiff in error. The order was presumably made for the accom-

O., N. & B. H. R. R. Co. v. Lamb.

plishment of some purpose known to the parties procuring it to be made, as it was not necessary if the question of damages was the sole question to be tried. In either case the owner of the land must be treated as the plaintiff in the action. He is entitled to the opening and closing on the trial. *O. & R. V. R. R. Co. v. Walker*, ante p. 432. This being the case it is quite apparent that the appeal could not be legally dismissed simply because the plaintiff in error was in default for want of an answer. In such case the proper practice is for the owner of the land to call his witnesses and prove his damages the same as in any other case where a defendant is in default. The decision of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

OMAHA, NIOBRARA & BLACK HILLS RAILROAD COMPANY, PLAINTIFF IN ERROR, V. MARGARET LAMB, DEFENDANT IN ERROR.

REESE, J.

The questions involved in this case are identical with those in the case of *Omaha, Niobrara and Black Hills Railroad Company v. Jacob Umstead and Maggie Umstead*, *supra*.

The judgment of the district court is reversed and the cause remanded.

REVERSED AND REMANDED.

O., N. & B. H. R. R. Co., PLAINTIFF IN ERROR, v. BARTHOLOMEW LAMB, DEFENDANT IN ERROR.

This case is similar to that of the *Omaha, Niobrara & Black Hills Railroad Company v. Jacob Umstead, supra*. The judgment of the district court is reversed and the cause is remanded.

REVERSED AND REMANDED.

17	463
19	679
17	462
53	471
54	220

JOSEPH F. STOUT, PLAINTIFF IN ERROR, v. GEORGE W. RAPP, DEFENDANT IN ERROR.

1. **Jurisdiction of Supreme Court.** The supreme court has jurisdiction to review upon error the judgments and decisions of the district court made upon appeal from the county court in matters pertaining to the settlement of assigned estates.
2. ———. The county court has jurisdiction, under the provisions of section 34 of the act regulating the assignment of estates (Compiled Statutes 1885, Chap. 6), to decide as to whether personal property is exempt from execution and whether it should or should not be delivered to the assignee. Such enquiry does not involve the question of the title to real estate.
3. **Exemptions.** Where the title to the family residence is in the wife, it is nevertheless the homestead of the family, and is exempt from judgment or forced sale upon execution or other process, and in such case the head of the family is not entitled to the further exemption of \$500 in personal property under the provisions of section 521 of the civil code.

ERROR to the district court for Antelope county. Tried below before TIFFANY, J.

Thos. O'Day, for plaintiff in error.

N. D. Jackson and *W. W. Byington*, for defendant in error.

REESE, J.

In October, 1884, the defendant in error made a general assignment of his estate to the sheriff of Antelope county, for the benefit of his creditors. In his inventory he claimed certain property as exempt from execution and refused to deliver the same to the assignee. Plaintiff in error was chosen assignee as the successor of the sheriff. After his qualification he made an application to the county court for the purpose of having the assignor required to perfect his inventory and turn over to the assignee the property claimed to be exempt. Upon a hearing, the county judge decided that the property was not exempt, and required it to be delivered to the assignee. From this order the assignor appealed to the district court. Upon the hearing in that court the cause was submitted upon the facts found by the county court, which were admitted by the parties. These facts were as follows:

1. That on October 14, 1884, George W. Rapp made a voluntary assignment for the benefit of his creditors, to M. B. Huffman, sheriff of Antelope county, under the provision of an act of the legislature of Nebraska, approved February 26, 1883, entitled "An act regulating voluntary assignments for the benefit of creditors, proceedings thereunder, and to prevent the fraudulent violations of the same."

2. That on October 21st, 1884, said George W. Rapp, assignor, filed an inventory of the assigned estate, together with a list of property, consisting of a stock of burial cases and fixtures, claimed by him as exempt, with the county judge of Antelope county, according to the provisions of said assignment act.

3. That Joseph F. Stout was legally appointed and qualified as assignee of said estate, to succeed M. B. Huffman, sheriff.

4. That Joseph F. Stout, assignee, made legal application to the county judge, under the provisions of section

84 of said assignment act, to have the personal property claimed by said George W. Rapp as exempt, in his said inventory filed with the county judge, listed and turned over to him, Joseph F. Stout, assignee, as a part of the assigned estate.

5. That said property was in the possession of said Rapp, and claimed by him as exempt.

6. That said Rapp, responding to said application, filed with the county judge an inventory of all his personal property, being the same property as claimed by J. F. Stout, assignee, in above application as belonging to the assigned estate, renewing his claim to said property as exempt, and at the same time filing an affidavit stating that he was a resident of Antelope county, Nebraska, the head of a family, and had neither lands, town lots, nor houses subject to exemption under the homestead laws of Nebraska.

7. That the property sought to be recovered by said J. F. Stout, assignee, as a part of said assigned estate, and claimed by said Rapp as exempt, was the undertaking goods used and carried on in connection with his general business of furniture, and is of the value of \$300.

8. That said George W. Rapp is a resident of Neligh, Antelope county, Nebraska, and the head of a family, and is the owner of neither lands, town lots, nor houses.

9. That Effie Rapp, wife of said George W. Rapp, is the owner in fee of certain village lots in the village of Neligh, Antelope county, Nebraska, with a dwelling-house thereon, occupied by said George W. Rapp and family as a residence, and he and family have resided thereon as a home for more than six months last past. Also that said Effie Rapp owns in fee a lot and business store building thereon, in Neligh, of the value of \$1,500. That the residence property above mentioned was procured by Effie Rapp from her own separate property.

10. That the property in controversy herein claimed

by George W. Rapp as exempt, is claimed solely under section 521, page 599, Compiled Statutes of Nebraska.

Upon these facts the district court reversed the decision of the county court, and found the property to be exempt. From this judgment plaintiff in error prosecutes error to this court.

The first question presented for decision is raised by defendant in error, which is, that this court has no jurisdiction to review the decision of the district court—that the decision of that court in cases of this kind must be final. The contention upon this point is, that under the provisions of section forty-one of the act referred to (Compiled Statutes 1885, chap. 6), the district court is required to “dispose of the matter summarily, without or without pleadings, and upon hearing such testimony as may be offered, and shall make such order in the premises as may be just.” That the clerk shall immediately certify the order to the county judge, and therefore the decision must be final. While it is apparent that it was the purpose of the legislature which passed the act referred to that questions arising out of the settlement of assigned estates should be disposed of as expeditiously as convenient, and without the delay of making up issues in the district court unless required by the exigencies of the case, yet we cannot conclude from the language used that it was the purpose of the law making power to prohibit review by the court of last resort.

Section 24 of article 1 of the constitution provides that, “The right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied.” It is an elementary rule of construction that laws passed by the legislature must be construed in the light of the constitution in force at the time of the enactment of the law. This being true it follows that the right to review causes of this kind upon error is not taken away by the section referred to.

Section 582 of the civil code provides that, “A judg-

ment rendered or final order made by the district court may be reversed, vacated, or modified by the supreme court for errors appearing on the record." Even though the constitutional guarantee above quoted had no application to cases of the kind at bar, yet we find nothing in the act of 1883 (Compiled Statutes, 1885, chap. 6) conflicting with this section which clearly gives the right of review to the unsuccessful litigant in the district court.

It is next insisted that "the county court had no jurisdiction to try or determine the question of exemptions." This objection is based upon the ground that as the county court cannot try a cause involving the title to real estate it had no jurisdiction to try the question as to whether defendant in error had a homestead within the meaning of the statute. We cannot agree with counsel for defendant in error upon this question. The question of *title* to real estate is not the question here involved. The court, proceeding under section 34 of the assignment law, may require the assignor to appear and submit to an examination under oath "as to all matters touching" his "estate or property; its situation and amount * * * and may compel the completion or correction of any inventory made by the assignor, or assignors, and the delivery of any money, choses in action, or property belonging to the assigned estate to the assignee," and may enforce its orders made in the premises. By the homestead law (Compiled Statutes, chap. 36) "a homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides, and its appurtenances, and the land on which the same is situated," etc., shall be exempt from sale on execution, etc. And by section 521 of the civil code it is provided that all heads of families who have neither lands, town lots, or houses subject to such exemption as a homestead, may have an exemption of \$500 in personal property. Suppose a debtor is not the owner of any real estate, and under the proceedings provided by section 34 so testi-

fies, has the county court lost jurisdiction of the matter upon the ground that by hearing the testimony offered, that the assignor has "neither lands, towns lots, or houses" he is trying the question of title to real estate? Under the provisions of section 182 of the civil code a debtor may replevin personal property levied upon by an officer under an execution, and allege in his affidavit that the property "is exempt from such execution or attachment under the laws of this state." Suppose, after having filed the inventory required by section 522 of the civil code, the property having been appraised and selected by him, and released by the officer holding the writ, it is re-taken by the officer who arbitrarily refuses the possession to the owner, the owner brings replevin and comes into court and testifies that he has no lands, lots, nor houses, does the justice of the peace or county court lose jurisdiction because it is trying the question of title to real estate? It could not be so claimed. In the case at bar the question of the ownership of any of the kinds of property exempt as a home might be incidentally drawn in question, but question of title could not possibly be adjudicated thereby, even if the court had jurisdiction to try the question of title. What higher or greater right to real estate could a party have after such an adjudication than he had before? None whatever. The objection to the jurisdiction of the county court is not well taken.

The most important and to my mind the most difficult question presented by the record in this cause for decision is the third and last. That is, whether or not the defendant in error was entitled to the property in controversy as exempt from execution, and hence from the operation of the assignment. By the admitted facts it is clear that the defendant in error is not the *owner* of either lands, town lots, or houses subject to exemption, and that he is the head of a family. These things being true, he claims the property in controversy as being exempt under the provis-

ions of section 521 of the civil code. It is also admitted that his wife, Effie Rapp, is the owner of certain village lots in Neligh, with a dwelling-house thereon, occupied by defendant in error as a residence for himself and family as a home, and that he has so resided thereon for more than six months. This being true, it is insisted by plaintiff in error that he is not entitled to the exemption of personal property as provided in section 521, *supra*. Counsel have cited us to no case where the question here involved has been decided, and with the limited time at our command we have not been able to find any based upon a statute similar to ours. It therefore becomes necessary to examine the question in the light of our statutes, aided by such adjudications as will tend to assist in their construction.

Section 1 of chapter 36 of the Compiled Statutes is as follows: "A homestead not exceeding in value \$2,000, consisting of the dwelling-house in which the claimant resides, and its appurtenances and the land on which the same is situated, not exceeding 160 acres of land, to be selected by the owner thereof, and not in any incorporated city or village, or instead thereof, at the option of the claimant, a quantity of contiguous land not exceeding two lots within any incorporated city or village, shall be exempt from judgment liens and from execution or forced sale except as this chapter provided." Section two of the same act provides that, "If the claimant be married the homestead may be selected from the separate property of the husband, or with the consent of the wife from her separate property. When the claimant is not married but is the head of a family within the meaning of section fifteen, the homestead may be selected from any of his or her property." The exceptions referred to in section one are found in section three of the act, which are debts secured by mechanic's, laborer's, or vendor's liens, and debts secured by mortgages executed and acknowledged by both husband and wife, or an unmarried claimant. It is also

provided by section four, "That the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife."

While the act provides the method of claiming and setting off a homestead, yet it is very apparent that such act of claiming and setting off is not essential or necessary to impress upon the property in which a debtor resides the homestead character. By the first section of the act, it may be observed, the property in which the claimant resides "shall be exempt from judgment liens and from execution or forced sale." This is an absolute exemption made so by the fact of residence or occupancy. *State v. Krumpus*, 13 Neb., 321. It is true that the homestead character of the property may be lost by the voluntary act of those entitled to the benefits of the law, and that the rights conferred by the law may be waived in favor of the debtor, but it is equally true that it cannot be conveyed or encumbered by the act of one (if husband and wife are occupying it) without the consent of the other, and this without reference to which party holds the title.

It is evidently the purpose of the statute of this state as well as all others having similar laws, that the homestead exemption shall not be so much for the benefit of the person standing in the position of the head of the family as for the family itself. This has been the holding of the courts with but few exceptions. See *Thompson on Homestead Exemptions*, §§ 40 and 41, and cases there cited. This view is further supported by sections 4 and 17 of the homestead law of this state. As we have seen by section 4, the homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed is executed and acknowledged by both husband and wife; and section 17 provides that, "If the homestead was selected from the separate property of either husband or wife, it vests on the death of the person from

whose property it was selected in the survivor for life, and afterwards in his or her heirs forever, subject to the power of the decedent to dispose of the same, except the life estate of the survivor by will. In either case it is not subject to the payment of any debt or liability contracted by or existing against the husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such as exists or has been created under the provisions of this chapter." By these sections we find that the homestead right is one which exists in favor of both husband and wife, and as much in favor of the one having no title to it as the one holding the legal title. It is also an estate of inheritance which descends to the survivor. It may consist of the separate property of either the husband or wife. If the property occupied by the family as a home belongs to either one or all so living together, it comes within the statute and is exempt as a homestead. *Partee v. Stewart*, 50 Miss., 721.

Suppose the wife had been the debtor instead of the husband, there can be no doubt but that the homestead would have been protected. *Orr v. Shraft*, 22 Mich., 260. *Crane v. Waggoner*, 33 Ind., 83. *Tourville v. Pierson*, 39 Ills., 446-453. *Partee v. Stewart*, *supra*. *Murray v. Sells*, 53 Ga., 257. *Dwinell v. Edwards*, 23 O. S., 603.

A family is entitled to but one homestead. *Tourville v. Pierson*, *supra*. *Gambette v. Brooks*, 41 Cal., 84.

Section 521 of the civil code provides that, "all heads of families who have neither lands, town lots, or houses subject to exemption as a homestead under the laws of this state shall have exempt from forced sale on execution the sum of five hundred dollars in personal property." In order to secure the benefit of this section it must appear that the "head" of the family has no real estate exempt. If the head of the family has a home in which the family resides, the exemption provided for by this section does not exist. They cannot have both. *Axtell v. Warden*, 7

Neb., 182. If he had no homestead he would not only be entitled to this exemption but either party (husband or wife) might select it from the personal property of the husband. *Reegan v. Zeeb*, 28 O. S., 483. *Dwinell v. Edwards*, *supra*.

It is a well established rule of law that exempt property is not the subject of fraudulent alienation. If a husband causes the homestead to be conveyed to the wife it still remains the homestead although the title may be in the wife. *McMahon v. Spielman*, 15 Neb., 658. And the head of the family would not be entitled to the exemption of personal property provided for by sec. 521, *supra*. Otherwise by a simple conveyance to the wife the exemption allowed the head of a family might be increased to the extent of the \$500 of personal property, which was clearly not intended by the legislature. But it is said the real estate of the wife in the case at bar, on which the family resides, was the separate property of the wife, procured with her own means, etc. We fail to see how that could change the result. In the case supposed, the wife could not convey nor incur the estate so long as the family continue to reside thereon. Neither could the wife of defendant in error. In that case also the husband could not be deprived of his right of survivorship; clearly he could not in the case at bar. So far as the rights of creditors are concerned we are unable to distinguish any difference.

We therefore conclude that the head of the family has real estate "subject to exemption as a homestead under the laws of this state," and that he is not entitled to the exemption of \$500 in personal property. It follows that the decision of the district court must be reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

ELIJAH FILLEY, PLAINTIFF IN ERROR, V. NOAH NORTON
ET AL., DEFENDANTS IN ERROR.

1. **Practice in Supreme Court.** The main question is one of fact and conflicting testimony, and presents no question of law.
2. **Parent and Child.** A father possessing a farm and a herd of cattle let the same to his son to farm, the product of both to be divided between them on the terms of two-thirds to the former and one-third to the latter; there being a certain cow in the herd which the father had given to the son before he became of age, and which had been kept and raised in common with other cattle on the farm, and was placed and kept as a part of the herd and so treated by the parties, *Held*, That so far as the rights of third persons were concerned the produce of said cow formed an indistinguishable part of such stock.
3. ———: ———. By a gift from a father to an infant daughter of a calf to raise and have as her own, without intention on his part that it will be taken off of his farm for many years, if ever, he does not part with his dominion over it, so as to prevent his recapturing it in his own name and right from the hands of a wrong-doer.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hazlett & Bates (*L. W. Colby* with them), for plaintiff in error.

Hardy & McCandless, for defendants in error.

COBB, CH. J.

This was an action of replevin commenced before a justice of the peace, and taken by appeal to the district court. The cause was tried to a jury with verdict for the plaintiff. A motion for a new trial was overruled and the cause brought to this court by defendant on error.

Plaintiff in error made several points in his petition in error as well as in his motion for a new trial, but only one

is discussed in his brief. Accordingly our examination of the case will be confined to that, and the others deemed as abandoned.

The only point urged in the brief of plaintiff in error is, "That the court erred in overruling the motion for a new trial." This point can in no possible view be maintained except on the ground that the evidence was insufficient to sustain the verdict.

The property replevied consisted of two calves about six months old, of the value of twenty-five dollars. It was pretty much entirely a question of identity. The plaintiffs and their witnesses swore with ordinary unanimity that the calves were the product of cows belonging to them on the farm of Noah Norton, which was being carried on, together with the stock, by Milo Norton, his son; that one of the calves had been raised entirely and the other partly by hand; that they had, for nearly the whole season, run about the house, and been daily fed and cared for by the sons and daughters of the senior plaintiff; that they were of peculiar color and marks, so as to attract attention both by the family, herdsmen, hired hands, and others; that early in the winter they became mixed with the herd of the defendant, with which they were driven to defendant's premises; that plaintiff went there for them, and afterwards, for more satisfactory identification, took the little girls there to pick them out of defendant's herd, which they did, but the defendant declining to give them up the suit was brought.

There was also a large amount of conflicting testimony on the part of the defendant. A number of witnesses on his part, nearly equal in number to those of the plaintiff, testified to one of the calves having been calved and raised on the place of the defendant, and the other one having been bought by him with a cow from one Acorn.

This is one of those cases not unfrequently happening where the identity of growing live stock becomes the sub-

ject of a dispute between neighbors, and is strongly asserted by a whole family and party on the one side, and as strongly denied by another whole family and its adherents on the other. This makes the fairest of all questions for a jury, and if fairly submitted to them, and they reach a verdict, it would be an enterprising court that would disturb it.

It is objected that the property, according to the showing of the plaintiffs, was not their joint property. The evidence is, that the farm and herd being the property of Noah Norton, he let it on shares for a term of years to his son, Milo Norton—the former to have two-thirds of the crops and product of the herd, and the latter one-third. It also appears that one cow, the mother of one of the calves in controversy, had been given by the father to this son some years before, when he was a minor and a member of the family of the father. This question is, I think, disposed of by the fact that the cow was by Milo Norton turned into the common herd and treated as part of the stock taken on shares from his father, and her stock, as constituting a part of the common product, to be shared between them under the terms of the contract.

It also appears that the other of the calves in question had been given by Noah Norton to Adah Norton, his daughter, about thirteen years old, living with him and as a member of his family, to care for, raise, and keep as her own. It is contended that the action of replevin, so far as this calf is concerned, cannot be maintained in the name of the plaintiffs below. In this connection it should be said that there is no evidence that Milo Norton ever consented to this gift, and being the owner of the one-third of the produce of the herd he never parted with his interest in this particular portion of it. But upon the main question, while it is by no means free of difficulty, and in the absence of authorities, I am of the opinion that a father making a gift to an infant son or daughter, a member of his family, of one or more growing head of live stock, without the in-

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tention of the same being removed from his farm or herd, does not part with his dominion over it so as to prevent his recapturing it in his own name and right from the hands of a wrong-doer.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	475
34	410

FRED. L. HARRIS ET AL., PLAINTIFFS IN ERROR, V.
ADOLPHUS V. CRONK, DEFENDANT IN ERROR.

Dismissal of Action in Vacation. An action in the district court, wherein no counter-claim or set-off has been filed, having been dismissed in vacation by the party plaintiff and all costs paid, according to the provisions of section 430a of the civil code, it is incompetent for the court at the next or any subsequent term to permit an intervention in said cause.

ERROR to the district court for Valley county. Tried below before TIFFANY, J.

Charles E. Magoon, for plaintiffs in error.

W. H. Williams, for defendant in error.

COBB, CH. J.

It appears from the record in this case that on the 30th day of October, 1882, Benjamin C. White and Edward M. Coffin commenced an action of replevin in the county court of Valley county against Fred L. Harris and Barney Weare. The writ issued in said cause was returned by the sheriff as personally served on the defendants, also by seizing the personal property therein described and upon the

due appraisement thereof according to law, and the taking of a bond with security in double the appraised value thereof, and the delivery of said property to the plaintiffs in said action.

And on the 3d day of November, 1882, it appearing to said county court that the said replevied property had been appraised at the sum of five hundred and nine dollars, a sum beyond the jurisdiction of the county court (as the law then was), the said county court by an order under its seal and the hand of the judge thereof duly certified said cause to the district court of Valley county.

On the 9th day of January, 1883, the said Benjamin C. White and Edward M. Coffin filed their petition in replevin in said cause in the said district court, and upon the same day the said Fred L. Harris and Barney Weare appeared in said court and filed a disclaimer therein, wherein and whereby they severally disclaimed any and all interest in the said replevied property or any part thereof and in the replevin bond given therefor by the plaintiffs in said action. And on the same day the said Benjamin C. White and Edward M. Coffin, plaintiffs in said cause, paid all costs in said action and entered and filed in the office of the clerk of said court an order finally dismissing said cause, which order was duly filed and certified by the clerk of said court.

It appears further that on the 25th day of April, 1883, A. V. Cronk came into said clerk's office and filed two papers, one being in the nature of an offer to answer in said case, and the other a combination of a petition for leave to intervene in said cause by petition in equity and an answer to the petition in said cause.

On the 14th day of May following, the said Fred L. Harris and Barney Weare filed a motion to strike the said papers filed by A. V. Cronk from the files, for the reason that the action had been dismissed; and again on the 16th day of the same month the said Fred L. Harris and Barney Weare filed in said clerk's office a demurrer to the said petition filed by the said Cronk.

It further appears by a journal entry contained in said record that on the 14th day of May, 1883, and on the fourth day of the term of said court, the said "cause came on for a hearing on the equitable petition of A. V. Cronk asking to be brought in and made a party defendant against the plaintiffs and against the defendant Fred L. Harris. Motion to strike equitable bill from the files overruled. The plaintiffs and the defendant, Fred L. Harris, demurred to the equitable bill of A. V. Cronk. * * * It is considered the demurrer be and the same is overruled and the cause continued to the next term of court."

It also appears by another journal entry in said record that further proceedings were had in said cause as follows:

"Now on this 19th day of April, 1884, being the 6th day of the April term, 1884, * * * the case being called, came up on petition of intervenor and answer of A. V. Cronk, intervenor, defending against B. C. White, E. M. Coffin, and F. L. Harris. F. L. Harris not appearing he was three times called and he came not, whereupon he was defaulted by the court. And upon the testimony of A. V. Cronk the court finds that there was due to the defendant, A. V. Cronk, intervenor, from the defendant, F. L. Harris, the sum of seventy-seven and $\frac{78}{100}$ dollars. It is therefore considered and adjudged by the court that the defendant, A. V. Cronk, recover of the defendant, F. L. Harris, the sum of seventy-seven and $\frac{78}{100}$ dollars, and costs."

The cause is brought to this court by the defendant, Fred L. Harris, by petition in error.

Section 430a of title XI. of the civil code provides as follows: "That the party plaintiff in any case pending in the district or supreme court of the state shall, when no counter-claim or set-off has been filed by the opposite party, have the right in the vacation of any of said courts to dismiss his said action without prejudice upon payment of costs, which said dismissal shall be by the clerk of any of

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said courts entered upon the journal and take effect from and after the date thereof."

I am unable to see why the case at bar is not altogether within the provisions of this section. There had been no counter-claim or set-off filed. It was in the vacation of the court; the plaintiff paid the costs and dismissed his case. There was then no cause pending in which the said A. V. Cronk could intervene with or without the leave of the court.

The judgment of the district court and all orders made in said cause subsequent to the 9th day of January, 1883, are reversed, and the cause stands dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	478
19	706

JACOB M. SHUMAN, APPELLANT, V. RACHEL C. WILLETS
ET AL., APPELLEES.

1. **Contract for Sale of Real Estate Construed.** A contract for the sale of real estate contained a provision that the consideration should "be paid in carpentering at \$2.50 per day," the purchaser to have five days' notice when his services were required, "and to complete payment within twelve months if work is called for," and "to be allowed twenty per cent discount on any part of price of lots paid in cash." *Held*, 1, That the purchaser had the entire twelve months in which to make payment, and that it was optional with him to make payment either in labor or money. 2, That the vendor without the assent of the purchaser could impose no new conditions on the purchaser, and forfeit his rights under the contract before the expiration of the year.
2. **Specific Performance.** Where a contract in relation to real estate has been deliberately entered into by competent parties, and is not open to objections of fraud, undue means, etc., in obtaining it, a court of equity will carry out the intention of the parties by specifically enforcing its obligations.

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3. —: ESTOPPEL. An action to enforce specific performance of a contract for certain lots was pending several years, and during this time certain parties erected a wooden building on one of the lots, which was not a fixture. This building the plaintiff afterwards rented for a short time but claimed to be the owner of the lot. *Held*, That he was not thereby estopped from enforcing his contract.

APPEAL from Harlan county. Tried below before GASLIN, J.

Fred B. Beall and J. E. Bush, for appellant.

John Dawson, for appellees.

MAXWELL, J.

This is an action for specific performance of a contract. The court below found the issues in favor of the defendants and dismissed the action. The action is founded on the following instruments:

“ALMA, NEB., July 2d, A.D. 1879.

“I have this day sold A. M. Shuman lots 5 and 6, in block 13, in the town of Alma, county of Harlan, and state of Nebraska, for the sum of one hundred dollars, to be paid in carpentering at \$2.50 per day; he to do good average days' works and to have five days' notice of time when work is wanted, and to complete payment within twelve months if work is called for. He to be allowed twenty per cent discount on any part of price of lots paid in cash. He to pay taxes of '79 and to have deed in fee on final payment.

“R. C. WILLETS,

“*By Wells Willets, attorney in fact.*”

“ALMA, NEB., July 2d, A.D. 1879.

“I have this day bought of R. C. Willets lots No. 5 and 6, in block 13, in the town of Alma, county of Harlan, and state of Nebraska, for the sum of one hundred dollars, to

be paid in carpentering at \$2.50 per day; I to do good average days' works; I to have five days' notice of time when work is wanted, and all to be worked out in twelve months if called for in that time. If any of the price is paid in cash a twenty per cent discount is to be allowed on price of lots to the amount paid in cash; deed in fee to be made on final payment; I to pay taxes of '79.

"J. M. SHUMAN."

It is alleged in the petition and not denied in the answer that A. M. Shuman, named in the first instrument, is J. M. Shuman, the plaintiff.

The defendants in their answer to the second amended petition admit that R. C. Willets at the date of the contract was the owner of the lots in question; admit the authority of the agent; allege that the plaintiff refused to perform the carpenter work after due notice to perform the same. That on the 10th of October, 1879, the defendant, R. C. Willets, notified the plaintiff to work after the expiration, of five days, and that plaintiff refused to comply with his request; that afterwards it was agreed between said parties that the plaintiff would commence work after the 25th of October, 1879, and labor continuously until he had paid said sum of \$100, but that he failed to perform said labor; that afterwards on the 20th of November, 1879, the defendant, R. C. Willets, after making a demand for said sum of \$80 which the plaintiff refused to pay, notified him that said contract was canceled, and the plaintiff acquiesced in said rescission; that after said rescission said R. C. Willets conveyed said lots to one Frank Shaffer, who afterwards conveyed to the other defendants. On the 2d day of July, 1880, the plaintiff tendered the agent of the defendant, Wells Willets, the sum of \$80, which he refused, and in October following, the plaintiff commenced this action. In his testimony the plaintiff denies that he had an opportunity to do carpenter work. He testifies: "I have never received any notice except once. In

the fall of 1879, Willets came to my house and requested that I work on the house in which he is now living, and gave me five days' notice. I said, I am sorry that you did not let me know a day sooner as I have taken a contract at Republican City, but I will put that off and work for you. He said, no, go on with your contract, I can get Greeley to do all that I want done. And that is the only notice I ever received." Mr. Willets does not deny this. In answer to a question whether he notified the plaintiff to work for him, he testifies: "I did; I left word with his wife about the 12th or 15th of September, 1879, and told her to tell him to come and see me. I saw nothing of him. Along in October I went to his house one Sunday evening, that was the only time he was visible, and requested him to work. He played off, saying he had other work, and said he could not leave without doing the work he was on. He claimed he could work for me in two weeks. I told him he might come then. He did not say positively. I waited two weeks, and I saw him one morning hitching up his horses to start away and I started to see him, and he whipped up his horses and run them clear down to the creek." The plaintiff denies this. Willets also testifies that the next time he saw the plaintiff he notified him that he must raise some money to pay the man that he had hired in his place, and notified him that if he did not he would declare the contract forfeited. It appears from other testimony that the amount of money demanded was about \$12 for a week's work. About November, 1879, Willets sold the lots in question to Shaffer for \$20 in money, and a number of lots in Republican City. Shaffer sent one Zerbe to see the plaintiff in regard to these lots, and as he testifies, the messenger "came back and said he could not do anything with him (the plaintiff)."

Q. How long was that before you purchased the lots?

A. I think it was a little before.

By Mr. Dawson.

Q. Is it not a fact that it was after the purchase of the lots by you, and you heard that he claimed an interest in them and you wanted to buy it?

A. I think it was before.

Mr. Shaffer, therefore, having purchased with notice of the plaintiff's rights, purchased subject to them. The other defendants purchased while this suit has been pending, and since the service of summons in the case, and are chargeable with notice of the plaintiff's rights. Code, § 85. *Day v. Thompson*, 11 Neb., 123. It is evident from an examination of the testimony that the plaintiff, at the time the contract was made, was a poor man, that the provision to permit him to perform labor in part or entire payment of the lots was not so much because his labor possessed a peculiar value over that of other carpenters, but to enable him thus to pay for the lots. It will be observed the provision is, that he is "to complete payment within twelve months if the work is called for," and that he is "to be allowed 20 per cent discount on any part of lots paid in cash." When to be paid in cash? Clearly at any time during which he might be required to perform labor as a carpenter. This included at least the whole year, yet we find the defendant, Willets, within five months from the date of the contract with the plaintiff, selling and conveying the lots in question to Shaffer, upon the pretext that he had been compelled to employ another carpenter for a week's work at an expense of \$12, a gain of \$3 over the price agreed upon to be paid the plaintiff. But even if the plaintiff had refused to perform labor for the defendant at his request, still there is no provision in the contract that it shall thereupon become null and void, and a court has no authority to interpolate such terms therein. In construing a contract that construction which makes the contract legal and operative will be preferred to one which would have the opposite effect. *Coke Litt.*, 42-183. *Church*

Wardens of St. Savior, 10 Rep. 67b. *Archibald v. Thomas*, 8 Cow., 284. *Many v. Beekman*, 9 Paige, 188. *Shore v. Wilson*, 9 Clark & F., 397. And where the question is whether words used in a contract should be taken in a comprehensive or restricted sense; in a general or particular sense; in the popular and common, or in some unusual and peculiar sense, in all these cases, the court will endeavor to give to the contract a rational and just construction; but the presumption of greater or less strength, according to the language used or the circumstances of the case, is in favor of the comprehensive over the restricted, the general over the particular, the common over the unusual sense. 2 Parsons on Contr. (5th Ed.), 500-1. Applying these principles to the contract in this case, and it is pretty clear that the plaintiff had an option to pay for the lots in question in money if he saw fit to do so.

II. The jurisdiction of courts of equity to decree specific performance of contracts for the sale of real estate is not limited, as in cases respecting chattels, to special circumstances, but is universally maintained. *Gartrell v. Stafford*, 12 Neb., 551. *Vindquest v. Perky*, 16 Id., 284. If a contract for the conveyance of land is in all respects fair, and there are no insurmountable difficulties in the way of a specific performance, it is as much a matter of course for a court of equity to decree specific performance of the contract as it is for a court of law to award damages for its breach. *Greenaway v. Adams*, 12 Ves., 395. *St. Paul Div., etc. v. Brown*, 9 Minn., 151. *King v. Hamilton*, 4 Pet., 311. As was said by Sir William Grant, in *Hall v. Warren*, 9 Ves., 608: "Supposing the contract to have been entered into by a competent party, and to be in the nature and circumstances of it unobjectionable, it is as much of course in this court to decree specific performance as it is to give damages at law." *Bennett v. Smith*, 10 Eng. L. & Eq., 274. *Gartrell v. Stafford*, 12 Neb., 546. *Adderly v. Dixon*, 1 Sim. & Stu., 607. Story's Eq., § 746.

That is, that a contract deliberately entered into by competent parties, where no improper or undue means were used to obtain it, will be enforced. In other words, the court will carry out the intention of the parties and maintain the obligations of the contract by requiring the party in default to perform on his part. The discretion spoken of in some of the cases is not an arbitrary one, but judicial in its nature—such as the incompetency of one of the parties to make the contract, fraud, undue means, etc., that would render the enforcement of the contract inequitable. There is nothing of that kind chargeable against the plaintiff in this case to debar him from the relief sought.

III. During the pendency of this action several wooden buildings have been erected on the lots in question. These appear to have been cheap structures, not affixed to the soil, and to which the plaintiff makes no claim. In 1883 one of the attorneys for defendant was possessed of one of these buildings, and rented the same to the plaintiff, as he claims and as the evidence tends to show, at \$4 per month, for six months. The plaintiff seems to have claimed the lots at this time, and the attorney testifies that he told him "if the lot is yours the building is." The plaintiff then refused to pay rent, and was ousted in proceedings in forcible entry and detainer. The plaintiff did not claim the buildings, but did claim the lots; and these proceedings do not estop him from asserting his rights.

IV. The defendants claim that the plaintiff did not intend to complete his contract if the town did not prove a success and lots advance in price, and Mr. Shaffer testifies that in the fall of 1879 he heard him make the following statement: "I have got a contract on some lots here; I don't know whether the town is going to make a place or not," and he said, "if lots go up I will make some money out of them, and if they go down I won't lose much." It will not be seriously contended that such language indicates an intention to abandon the contract. Upon the whole case

we are of the opinion that the plaintiff is entitled to a decree. There has been great delay in prosecuting the action, but whether either or both of the parties are to blame for the delay does not appear and cannot be considered. The action was commenced in a reasonable time after the refusal of Willets to convey, and parties who have purchased since the service of the summons are not innocent purchasers, and are chargeable with notice of the plaintiff's rights. The buildings, so far as appears, are not attached to the soil and the plaintiff makes no claim to them. The judgment of the court below is reversed, the plaintiff is required within sixty days to pay to the clerk of this court, for the use of the defendants entitled to the same, the sum of \$80, with interest at seven per cent from the 2d day of July, 1880, upon the payment of which the defendants are required to execute and deliver to the plaintiff a good and sufficient deed for the lots in question, and upon their failure to do so for ten days from that date, the decree in this case shall operate as such conveyance. And that the plaintiff recover his costs herein, to be taxed by the clerk.

DECREE ACCORDINGLY.

THE other judges concur.

H. W. BARDWELL, PLAINTIFF IN ERROR, V. THOMAS M.
STUBBERT, DEFENDANT IN ERROR.

1. **Replevin: AFFIDAVIT.** In replevin, where the object of the action is to obtain a delivery of the goods which it is claimed are wrongfully detained by the defendant, the filing of an affidavit setting forth substantially the facts required by the statute, is a condition precedent to the issuing of the order of delivery.

17	485
40	878
17	485
46	571
17	485
51	106
51	661
17	485
159	210

2. ———: ———: PLEADINGS: AMENDMENT. Where A brought an action of replevin against B to recover certain chattels, filed the proper affidavit, and obtained an order of delivery, under which he recovered possession of the property, he cannot afterwards, before the trial, amend his petition by making C a joint defendant with B to recover the property, unless in an affidavit filed before he obtained the chattels in controversy he had charged C with the wrongful detention of the same.
3. ———: EVIDENCE. A plaintiff in replevin must recover, if at all, on the strength of his own claim, and a failure to prove his right to the immediate possession of the property, where the illegal detention is denied, is a failure of proof upon a material point.

ERROR to the district court for Antelope county. Tried below before TIFFANY, J.

Thos. O'Day, for plaintiff in error.

N. D. Jackson and *D. A. Holmes*, for defendant in error.

MAXWELL, J.

In June, 1881, the defendant in error commenced an action in replevin in the district court of Antelope county against James A. Bardwell to recover the possession of six head of cattle. The return on the summons is as follows: "I served the within summons on the within named defendant, James A. Bardwell by delivering to H. W. Bardwell, his agent, a certified copy of this summons with all the endorsements thereon." And on the order of replevin, after stating the taking and delivery of the property to Stubbett, is the further certificate that, "I also on said day delivered to H. W. Bardwell, agent of said James A. Bardwell, a true and certified copy of the order." In May, 1882, an order was made, apparently at the request of the defendant in error, making H. W. Bardwell a party to the action. In August or September, 1882, more than a year after the commencement of the action, an amended petition was filed

against James A. and H. W. Bardwell, charging them with the wrongful detention of the property in question. No new affidavit or undertaking was filed. The attorney for H. W. Bardwell then filed a motion to dismiss as to said Bardwell for various reasons that need not be noticed. The motion was overruled, and he thereupon filed an answer in effect denying the wrongful detention of the property. On the trial of the cause the jury returned a verdict in favor of Stubbett against H. W. Bardwell, and assessing the damages at \$100. Judgment was thereupon rendered against H. W. Bardwell for \$100 and the costs of the action, taxed at \$79.28.

At common law a writ of replevin was issued out of the court of chancery, and could be sued out only at Westminster. Afterwards, by the statute of Marlbridge, 52 Henry, 111, ch. 21, the sheriff of each county, "upon plaint to him made," was authorized to replevy the goods. 3 Blacks. Comm., 147. The affidavit takes the place of the plaint, or rather it is the plaint, the word having the same meaning it had in the statute of Marlbridge. Wells on Replevin, § 654. The affidavit required by the statute, therefore, is the complaint of the common law. *Anderson v. Hapler*, 34 Ill., 439.

Section 182 of the code provides that an order for the delivery of personal property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there shall be filed in his office an affidavit of the plaintiff, his agent, or attorney, showing: 1st. A description of the property claimed. 2d. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the same. 3d. That the property is wrongfully detained by the defendant. 4th. That it was not taken in execution on any order or judgment against said plaintiff, etc.

Sec. 183 provides what the order shall contain.

Sec. 184 provides when it shall be returnable; sec. 185, the mode of executing it; and section 186 requires the sheriff before delivering the property to the plaintiff to take a written undertaking to the defendant in at least double the value of the property taken, to the effect that the plaintiff shall duly prosecute the action, and pay all costs and damages that may be awarded against him, and return the property to the defendant in case judgment for a return of such property is rendered against him, etc.

Sec. 197 provides that any order for the delivery of the property issued under section 182 without the affidavit required thereby, shall be set aside at the cost of the clerk issuing the same, and the clerk as well as the plaintiff shall also be liable in damages to the party injured.

In all cases where the object of the action is to obtain a delivery of the goods which it is alleged are wrongfully detained by the defendant, the affidavit required by the statute is a prerequisite to the issuing of the order of delivery, and without it the order will be a nullity if issued. *Wilbur v. Flood*, 16 Mich., 40. *Phenix v. Clark*, 2 Id., 327. *Perkins v. Smith*, 4 Blackf., 302. *Milliken v. Selye*, 6 Hill, 628. *Bridges v. Layman*, 31 Ind., 385. *Payne v. Bruton*, 5 Eng. (Ark.), 57. *Cutler v. Rathbone*, 1 Hill, 204. *Kehoe v. Rounds*, 69 Ill., 352. *McClaghay v. Cratzenberg*, 39 Id., 123. *Stacy v. Farnham*, 2 How. Pr., 26. *Berrien v. Westervelt*, 12 Wend., 194. Wells on Rep., § 651. There was no affidavit in this case charging H. W. Bardwell with the wrongful detention of the property in dispute, nor was there any undertaking to indemnify him in case of loss. The whole proceeding as to him, therefore, is unauthorized and void. But even if the action had been properly brought as to him, still the judgment could not be sustained. There is no testimony in the record tending to show that the plaintiff below (defendant in error) was the owner of the property in dispute, or had a special property therein, or was entitled to the immedi-

ate possession of the same. He must recover, if at all, on the strength of his own claim. *Goodman v. Kennedy*, 10 Neb., 273. There is not sufficient testimony, therefore, to sustain a verdict in his favor, nor is there any evidence tending to show the wrongful detention of the property by the defendant below (plaintiff in error). It is probable, too, that greater latitude should have been allowed in the admission of evidence, but this may be permitted in the next trial. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

J. L. CALDWELL ET AL., PLAINTIFFS IN ERROR, V. THE
BLOOMINGTON MNFG. CO., DEFENDANT IN ERROR.

17	489
18	573
22	531
17	489
27	141
17	489
44	42
44	117

Partnership. Where a firm is insolvent the partnership property will be applied to the payment of the partnership debts, and an individual creditor of a member of the firm cannot be paid out of partnership property to the exclusion of creditors of the firm.

ERROR to the district court of Lancaster county. Tried below before POUND, J.

J. L. Caldwell, pro se.

A. C. Platt and *Harwood & Ames*, for defendant in error.

MAXWELL, J.

In September, 1882, one John Krohn executed a bill of sale to George W. Severance of all his "interest in and to the goods and chattels of the firm of Krohn and Koener,"

subject to a certain chattel mortgage held by one George E. Fisher, the consideration named being the sum of \$200 attorney's fees for services rendered by W. F. Severance to Krohn as an attorney. In September of the same year, the plaintiff, Caldwell, rendered services as an attorney for Ida Koener to the amount of \$50, for which she executed a bill of sale of the same property as Krohn. In October, 1882, Fisher foreclosed his mortgage and the plaintiffs claim to have separated the remainder of the property covered by their bills of sale—had in fact taken possession of the same some two or more hours before the attachment under which the defendant claims was levied upon the property in dispute. The defendant is a creditor of the firm of Krohn and Koener for goods sold to the firm. The firm is insolvent and seems to have been at the time the bills of sale were executed. The plaintiffs are creditors of the individual members of the firm. The question presented, therefore, is, what are the rights of individual creditors of an insolvent firm to the partnership assets as against the creditors of the firm?

The question here presented was before this court in *Roop v. Herron*, 15 Neb., 73, where it was held that when a firm is insolvent the partnership property will be applied to the payment of the partnership debts, and an individual creditor of a partner cannot be paid out of firm property to the exclusion of firm creditors. This decision, so far as we are aware, has not been questioned, and we adhere to it. The case of *Schoverling v. Kovar*, 15 Neb., 306, turned principally upon the question of the good faith of the parties and was not intended to overrule that of *Roop v. Herron*. The judgment of the district court is clearly right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

EDWIN BOND, APPELLEE, v. THOMAS J. DOLBY, MARY
DOLBY, AND EUGENE H. ANDRUS, APPELLANTS.

1. **Practice in Supreme Court on Appeal.** In cases tried to a court without the intervention of a jury the finding on questions of fact upon conflicting testimony is entitled to the same respect in the supreme court on appeal as would be accorded to to the verdict of a jury under like circumstances, and will not be interfered with unless clearly wrong. *Bank of Cass Co. v. Morrison, ante p. 341.*
2. **Interest.** Where a promissory note, by its terms, fixes a legal rate of interest per annum "from date until paid," such note will draw interest at the agreed rate after as well as before maturity. And the judgment or decree rendered thereon will draw the same rate of interest notwithstanding the legal rate upon judgments and decrees may be reduced after the execution of the note.
3. **Mortgage on Real Estate Assumed by Purchaser.** When, in the purchase of real estate, the purchaser assumes and agrees to pay a debt secured by a mortgage upon the real estate so purchased, and retains a part of the purchase price for that purpose, in a proceeding against the mortgagor and such purchaser to foreclose the mortgage, the question as to whether the mortgagor had a mortgageable interest in the real estate is an immaterial one and would not affect the liability of the defendants for the payment of the debt.

APPEAL from the district court for Lancaster county.
Heard below before POUND, J.

Marquett, Dewese & Hall, for appellant Andrus.

Lamb, Ricketts & Wilson, for appellee.

REESE, J.

This is an action for the foreclosure of a mortgage. The appellant purchased the land of the mortgagor, and is made a party defendant to the action. The petition alleges that as a part of the purchase price he assumed and agreed to

17	491
29	660
17	491
31	492
31	628
17	491
39	497
17	491
46	398

pay the debt secured by the mortgage and thereby became personally liable to the plaintiff for the payment of the same. The answer of appellant denies the allegations of the petition and alleges that the mortgagor, Dolby, never owned the premises described in the mortgage. This allegation is denied by the reply.

From the evidence introduced upon the trial it appears that Dolby, the mortgagor, attempted to secure the mortgaged premises by a homestead entry, and while occupying them he executed the mortgage. The B. & M. R. R. Co. contested his right to the land, and the decision was rendered in favor of the R. R. Co., the land being held not subject to homestead entry. Afterwards Dolby purchased the land from the R. R. Co., by contract, and subsequently sold it to appellant, transferring the contract by assignment executed by Dolby and wife. In support of the allegation in the petition that Andrus assumed and agreed to pay the debt, Dolby testifies as follows:

Q. State whether or not you purchased the claim of the B. & M. R. R. Co. to the land? If so, when?

A. I did; I purchased it from the B. & M. R. R. Co. about June, 1883.

Q. About what time did you sell the land to the defendant, Andrus?

A. About the first of October, 1883.

Q. Did you tell him about the mortgage to Bond?

A. I did.

Q. What arrangement, if any, did you make with Andrus about paying Bond's mortgage?

A. I made arrangements to pay it by settling with him for two hundred dollars.

Q. Was any money left in his hands to pay it, and if so, how much?

A. There was two hundred dollars left with him for that purpose.

Andrus testified that he did not agree to pay the mortgage, but that two hundred dollars was deducted out of the purchase price and retained by him with which to pay the unpaid taxes on the land and "fight" the mortgage. Thus a question of fact was presented to the trial court for decision upon conflicting testimony.

In view of the rule so well established by this court, that it will not disturb findings of fact by the trial court upon conflicting testimony, we cannot molest this finding. It is urged by appellant that under the pleadings the burden of proof is upon plaintiff and he must establish the fact of the agreement by a preponderance of evidence. This is true, and was doubtless considered by the trial court when deciding the case. There was testimony sufficient, if uncontradicted, or if believed by the trier of fact, to sustain the finding. The witnesses, with the exception of Dolby, whose deposition was read, were before the court. Their manner of testifying, their demeanor while upon the stand, with the surroundings, were all considered by the learned judge who heard the case. The question of the weight of their testimony was for him to decide. *Blackburn v. Ostrander*, 5 Neb., 219. *McCune v. Thomas*, 6 Id., 488. Andrus alone appeared and made a defense. This defense was made only in so far as it could affect the mortgage. No effort was made to release Dolby from the obligation of the debt. The court might well hesitate before concluding that Dolby would furnish money to Andrus for the purpose of "fighting" the mortgage and still be liable himself for the payment of the debt evidenced by the note. The finding of the court that appellant made the alleged agreement and is liable thereon must stand.

An attorney's fee of \$35.75 was allowed by the court. Appellant insists that this was error. The note provides for the payment of an attorney's fee of ten per cent in case action should be brought thereon. It was executed the 5th day of May, 1879. The act approved February 24, 1879,

repealing the law allowing attorney's fees, having no emergency clause, did not take effect until after the execution of the note. Constitution of Nebraska, article 3, title "Legislative," § 24; also see § 1, chapter 88, Compiled Statutes. *Dow v. Updike*, 11 Neb., 96. *Hardy v. Miller, Id.*, 399.

The note provided for the payment of "interest at the rate of twelve per cent per annum from date until paid." By the decree of the court interest was computed at that rate to the time of the decree. This was correct. *Kellogg v. Lavender*, 15 Neb., 256. The decree also provides that it shall draw interest at the same rate. This is complained of by appellant. At the time of the execution of the note the law of this state made twelve per cent per annum the legal rate, if contracted for by the parties. The law also provided that, "interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof, at the rate of ten dollars upon each one hundred dollars annually, until the same shall be paid; *Provided*, That if said judgment or decree shall be founded upon any contract, either verbal or written, by the terms of which a greater rate of interest, not exceeding the amount now allowed by law, than ten per centum shall have been agreed upon, the rate of interest upon such judgment or decree shall be the same as provided for by the terms of the contract upon which the same was founded." General Statutes, chapter 34, § 3, page 446. This law was amended by the act of February 27, 1879, which took effect June 1st of that year. Section 3 above quoted being the law at the time the contract was made the rights of the parties must be determined by it.

By the finding of the district court, that Andrus assumed and agreed to pay the note secured by the mortgage as a part of the contract between him and Dolby, the question as to whether Dolby had a mortgageable interest in the land becomes an immaterial one. The debt existed whether the mortgage was valid or not. The retention of the money

Wyant v. Tuthill.

and agreement to pay the debt by Andrus would fix his liability.

The decree of the district court is therefore affirmed.

DECREE AFFIRMED.

THE other judges concur.

LILLIAN WYANT, PLAINTIFF IN ERROR, V. L. D. TUTHILL,
DEFENDANT IN ERROR.

17	495
53	778
54	67

1. **Judicial Sale.** Real estate appraised and advertised under an order of sale before the return day of the writ may be sold after the return day.
2. ———: **CONFIRMATION.** A sale of real estate under an order of sale, where the notice is not published at least thirty days before the sale, will be set aside on motion; but if the sale is confirmed without objection, in the absence of fraud the purchaser will acquire a good title.

ERROR to the district court for Nuckolls county. Heard below before MORRIS, J.

Royce Wyant, for plaintiff in error.

Doniphan & Reed and *D. W. Barker*, for defendant in error.

MAXWELL, J.

This is an action brought by the plaintiff against the defendant to quiet the title to the west half of section twenty-two, township four north, range five west, in Nuckolls county. The court below found the issues in favor of the defendant and dismissed the action. The plaintiff appeals. It appears from the record that in the

year 1880 one Charles Ayres was the owner of the land in question; that in November of that year a judgment on an attachment was rendered against him by the district court of Nuckolls county in favor of one Herbert Watrous, for the sum of \$632.81 and costs, and an order made to sell the property in controversy; that on the 23d day of April, 1881, after notice as required by law, the land in question was sold to the defendant for the sum of \$844.40. The sale was thereafter confirmed and a deed ordered and made to the purchaser. On the 20th day of June, 1882, and more than a year after the execution of the sheriff's deed to the defendant, Ayres executed a quit-claim deed of the premises in question to the plaintiff, and this is the title she claims to possess. The plaintiff claims in her brief, first, that as the land was not sold within sixty days from the date of the order of sale that therefore the sale is void; and second, that the notice of sale was advertised but twenty-nine days before the sale.

The first question was before this court in *Johnson v. Bemis*, 7 Neb., 224, and it was held that, where there is no prohibition in the statute, a sheriff who has levied an execution upon real or personal property of the debtor before the return day of the writ may sell such property after the return day thereof. And that this rule applies to an order of sale. *Phillips v. Dana*, 3 Scam., 551. *Cox v. Joiner*, 4 Bibb., 94. *Lester's Case*, 4 Humph., 383. *Logsdon v. Spivey*, 54 Ill., 104. *Savings Inst. v. Chum*, 7 Bush., 539. *Heywood v. Hildreth*, 9 Mass., 393. *Kane v. McCown*, 55 Mo., 181. *Remington v. Linthicum*, 14 Pet., 84. *Wheaton v. Sexton*, 4 Wheat., 503. *Doe v. Stone*, 1 Hawks, 329. *Stewart v. Severance*, 43 Mo., 322. *Taylor v. Gaskins*, 1 Dev., 295. *Wright v. Howell*, 35 Iowa, 288. *Gentler v. Martin*, 3 Md., 146. *Pettingil v. Moss*, 3 Minn., 223. *Wood v. Colvin*, 5 Hill, 230. *Moreland v. Bowling*, 3 Gill., 500. *Devoe v. Elliott*, 2 Cal., 243. *Bank v. Bray*, 37 Mo., 194. The first objection, therefore, is not well taken.

Second, It appears that the notice of sale was published the first time on the 24th of March, 1881, and the sale took place on the 23d of April following. The sale, therefore, took place on the thirtieth day after the publication of the notice. The statute requires the notice of sale to be published at least thirty days before the day of sale. This was not done in this case, and the failure to do so was good cause for setting the sale aside. A sale of this kind, however, is not void, but voidable, and the defect is cured by confirmation, except, perhaps, where by reason of fraud not then known the debtor is unjustly deprived of his property. In this case the plaintiff relies upon her legal rights alone, and has failed either to plead or prove facts entitling her to any relief whatever. Indeed, the testimony on behalf of the plaintiff is exceedingly meager; nor does the record contain the sheriff's return nor show what was done with the surplus derived from the sale after paying the judgment and costs; while it does appear that objections to the confirmation of the sale were withdrawn and the sale confirmed and a deed ordered and made to the purchaser.

The judgment of the district court is right, and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	498
21	734
17	498
28	680
17	498
57	947
17	498
62	488

**SMITH & CRITTENDEN, PLAINTIFFS IN ERROR, V. JERRY
B. SANDS AND LEWIS H. KENT, DEFENDANTS IN
ERROR.**

Sale: PURCHASER: LIABILITY OF FRAUDULENT GRANTEE. A fraudulent grantee who obtains property of an insolvent debtor, with notice that the purpose of the debtor is to hinder and defraud his creditors, cannot be protected as against such creditors, and if he sell the property to a *bona fide* purchaser he is liable to the creditors for the value of the property, less any valid liens existing against it when the alleged purchase was made.

ERROR to the district court for Harlan county. Tried below before GASLIN, J.

Case & McNeny, for plaintiffs in error.

John Dawson, for defendants in error.

MAXWELL, J.

This is an action to recover a judgment for the sum of \$650 against Kent, who is alleged to be a fraudulent grantee of certain goods belonging to one Sands, by reason of which the plaintiffs were defrauded. A demurrer to the petition was sustained in the court below and the action dismissed. It is alleged in the petition in substance that, on the 18th day of January, 1884, the defendant, Sands, and his co-partner, Hullquist, were doing business at Orleans in this state; that during the year 1883 the plaintiffs sold to said firm divers goods, wares, and merchandise, for which said firm, on the 18th of January, 1884, was indebted to the plaintiffs in the sum of \$503.88; that at the last mentioned date said firm had in their store at Orleans a large and valuable stock of "general merchandise, notions, boots and shoes, and goods and wares of various kinds, and notes, and accounts, and credits, the value whereof amounted

to about the sum of six thousand dollars;" that on the 21st of January, 1884, said firm confessed judgment in the county court of Phelps county in favor of the plaintiffs, a transcript of which judgment was then duly filed in Harlan county (in which Orleans is situated), and an execution issued thereon, which was returned wholly unsatisfied. That subsequent to the contracting of the debt aforesaid to the plaintiffs, to-wit, on the 18th day of January, 1884, the defendant, Sands, in the name of his firm, executed and delivered to the defendant, Kent, a chattel mortgage upon the stock of goods of said Sands & Co., the expressed consideration in said mortgage being about the sum of \$2,700, and that said Kent afterwards sold said "goods to parties to plaintiff unknown;" that before the execution of said mortgage said Sands and Kent "combined, confederated, and conspired together against these plaintiffs and other creditors of J. B. Sands & Co., and that in pursuance of the confederation, combination, and conspiracy aforesaid, and to further and carry out the same the said defendant, Jeremiah B. Sands, made and executed in the firm name of J. B. Sands & Co. the chattel mortgage aforesaid to said Kent;" that the real consideration for said mortgage did not exceed the sum of \$400, and the only purpose of said mortgage was to place said property beyond the reach of plaintiffs, "and convert to the use and benefit of said defendants, in fraud of the rights of plaintiffs the stock of goods, wares, and merchandise aforesaid."

"That said chattel mortgage was accompanied by a written agreement reserving a secret trust for the benefit of said defendant Sands, in fraud of the rights of plaintiffs, whereby the defendant Kent promised to pay over to defendant Sands all sums arising from the sale of said goods over and above the sum of seven hundred dollars." It is also alleged that this writing was kept secret by the parties to it; that the firm of J. B. Sands & Co. is insolvent, and that by means of the chattel mortgage the defendants

have obtained the property of Sands and company, and converted the same to their own use, whereby the plaintiffs have been defrauded and prevented from collecting their claim. There are other allegations in the petition to which it is unnecessary to refer. If the allegations of the petition are true there is no doubt the plaintiffs are entitled to recover.

That the fraudulent grantee in possession of the property of the debtor cannot be protected as against the creditors of the debtor is too well established to require the citation of authorities. Such property is held by the fraudulent grantee in trust for creditors of the debtor, and if the property is converted into money it is impressed with the same trust, and it is the duty of the court to see that the property or money, being that of the debtor, is applied upon the debts.

The question here involved was before the supreme court of Wisconsin in *Ferguson v. Hillman*, 55 Wis., 181. In that case one Mathews was in embarrassed circumstances and unable to pay his debts. Hillman was well acquainted with all the facts, and took conveyances from Mathews of all his real estate not exempt from execution, paying nothing therefor except the assumption of certain mortgages and judgment liens on the premises, and the debt of one creditor in addition to a claim due to Hillman himself. At the same time Hillman took two chattel mortgages upon all the exempt personal property of Mathews, and as a consideration therefor gave his promissory note for \$3,000, due in three and six months, and in exchange for this note took two notes of Mathews, one for \$1,500, and one for \$2,000, due at a future date, and the chattel mortgage was given to secure these notes. The \$500 difference between the notes was claimed to be a debt due from Mathews to Hillman. The court held that these facts with others shown in the record were sufficient to prove the intent to hinder and delay creditors of Mathews, and personal

judgment against Hillman for an amount not exceeding the value of the property of Mathews converted by him was sustained. In *Fullerton v. Viall*, 42 How. Pr., 294, the defendant had taken a conveyance from a debtor of certain real estate upon which there was a mortgage of \$800, and agreed to pay in addition the sum of \$1,000, of which sum \$500 was to be paid in cash, and \$500 in a debt alleged to be due from the defendant to the debtor. Before the creditor's suit was commenced the defendant had sold the real estate to a *bona fide* purchaser for the sum of \$2,270. The court found that the conveyance was made in fraud of the creditors of the grantor, and that the creditors were entitled to judgment against the defendant for the value of the real estate conveyed to him over and above the prior incumbrance thereon. This case was afterwards affirmed by the court of appeals, and is cited with approval in *Union National Bank v. Warner*, 12 Hun., 306-8. To the same effect also *Murtha v. Curley*, 90 N. Y., 372. Wait on Fraud. Conv., §§ 177, 178.

A debtor, while the owner of his property, sustains two distinct relations in regard to it, viz., as owner and as *quasi* trustee for his creditors. If his creditors have taken no lien upon the property as security they may be said to have given him credit upon the implied agreement that his property shall, if necessary, be applied to the payment of his debts, and such creditors have an equitable lien upon the property for that purpose. Bump on Fraudulent Conv., 13, 14. *Eppes v. Randolph*, 2 Call, 125. *Seymour v. Wilson*, 19 N. Y., 417. The law requires the debtor to act in good faith with his creditors, and apply his property not exempt, if need be, to the payment of his debts. If he attempts to evade this duty, and for the purpose of hindering or defrauding his creditors by transferring his property to another without consideration, or with knowledge on the part of grantee of the fraudulent intent, such grantee will take the property charged with

the trust, and if he converts the property into money he will be liable for its value, less any valid liens subsisting against it. And as the court administers both law and equity it should adapt the relief to the facts proved, and if need be permit an amendment of the prayer or petition for that purpose. The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

17	508
18	379
17	502
53	695

THE STATE, EX REL. JOHN MCBRIDE, v. MICHAEL D. LONG.

Clerks District Court: ELECTION. Under the provisions of section 7 of the election law, which provides that in each county having a population of 8,000 inhabitants there shall be elected in the year 1879 and every four years thereafter a clerk of the district court, etc., a county which in 1883 contained less than 8,000 inhabitants at the time the census was taken in that year, but more than that number thirty days before the general election, was authorized to elect a clerk of the district court.

ORIGINAL action in nature of *quo warranto*.

H. M. Uttley and *M. P. Kinkaid*, for the relator.

W. H. Munger, for the respondent.

MAXWELL, J.

This is an action in *quo warranto* to oust the defendant from the office of clerk of the district court of Holt county and instate the relator therein. By the census taken in the spring of 1883 the population of that county was found

to be 7,443, which it is claimed by the relator was largely augmented by immigration during the summer of that year, so that thirty days prior to the election of 1883 the population exceeded 8,000. No election for clerk of the district court was had in that county in 1883, but in the year 1884 the relator was elected to fill the vacancy, receiving a majority of all the votes cast in the county. Sec. 7 of the election law provides that, "in each county having a population of 8,000 inhabitants or more there shall be elected in the year 1879 and every four years thereafter a clerk of the district court in and for such county; and in each county having a population of less than 8,000 inhabitants the county clerk shall be *ex officio* clerk of the district court," etc. Comp. Stat., Chap. 26. In 1869 an act was passed by the legislature to provide for the enumeration of the population and registration of the births and deaths in the state. The blank forms given in the act relate almost entirely to births and deaths; and it is apparent from a comparison of the several sections that the collection of facts as to the number of births and the causes of death was the primary object of the legislature in passing the act. In no statute of the state, so far as the writer is aware, is the census taken under this act made the basis for any action of the legislature, or of any municipal or other corporation. Indeed the twelfth subdivision of the fifteenth section of the act creating cities of the first class expressly authorizes such cities "to provide for and cause to be taken an enumeration of the inhabitants of the city." Comp. Stats., Ch. 13, Laws of 1883, 91. The annual census not being made by statute the basis upon which the population of a city or county at an election succeeding the taking of the same is to be estimated, there would seem to be no authority for this court to inject into the election law the words "as returned by the census taken in 1883." The language of the election law is general, "that in each county having 8,000 inhabitants or more there shall be elected,"

etc. This, in the absence of any restriction, would seem to apply to the time the election was called, and not to the time the census was taken. It is well known that in some of the new counties of the state thousands may be added to their population by immigration in a single year, and this largely during the summer season. It is but reasonable to suppose that this fact was taken into consideration by the legislature in passing the act, hence its general language. The cities and villages of the state, as well as counties, are classified according to population. Thus, cities containing more than twenty-five thousand inhabitants are cities of the first class. Comp. Stat., Chap. 13. And cities of the second class having more than ten thousand inhabitants. Laws of 1883, Ch. XVI. Sec. 2 of this act provides that, "Whenever any city shall hereafter have attained a population of ten thousand inhabitants, and such fact shall have been duly ascertained and certified by the mayor of such city to the governor, the governor shall by proclamation declare such city to be a city of the second class," etc. It is very clear that the mayor of such city is not required to rely upon the census taken under the statute, but may ascertain that fact in any other legitimate mode. So towns containing more than fifteen hundred inhabitants and less than ten thousand are to be cities of the second class, while towns containing not less than two hundred nor more than fifteen hundred may be incorporated as villages. Laws of 1881, Ch. 22. In none of these cases is the census referred to as the criterion for determining the population, while in most of them it is apparent that it is not. The inquiry may be made by what means is the population of a county or city to be ascertained if not exclusively by the census? The answer is, it is to be determined like any other question of fact, by the best evidence that can be obtained. The votes polled at the election in 1883, when multiplied by the well-known ratio of population to the number of voters in a county, is evidence tending to prove the number of

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inhabitants. The question as to the mode of proving the population of a county does not arise in this case, because it is conceded if the census is not to be taken as a basis that the county contained more than 8,000 inhabitants at the time of the election. As in our view the relator was legally elected to the office in controversy, and is entitled to the possession of the same, judgment will be entered ousting the defendant from said office and instating the relator therein.

JUDGMENT ACCORDINGLY.

REESE, J., concurs.

COBB, CH. J., dissents.

P. R. SHELLEY, PLAINTIFF IN ERROR V. JOHN D.
HEATER, DEFENDANT IN ERROR.

17	505
28	581
17	505
29	79

1. **Trustee: FRAUDULENT SALE.** In an action of replevin against an officer who had possession of the property in dispute under an order of attachment against a third party, the plaintiff having purchased from the attachment defendant, and where it is alleged by the defendant in the replevin action that the goods were placed in the hands of the defendant in attachment to sell in the ordinary course of trade, the proceeds to be accounted for, it was *Held*, Error for the trial court to instruct the jury that if the goods were placed in the hands of the attachment defendant to sell and account for the proceeds, and the purchaser knew or might have known of the arrangement by which the vendor had the goods, he could not hold them, the instruction failing to inform the jury that they must find that the sale was made in violation of the trust and without authority.
2. ———: ———: **EVIDENCE.** Where it is sought to establish the fact that property was held by the vendor in trust for certain purposes, to be disposed of in a certain way, and that the purchaser knew of the trust and conspired with the trustee to pur-

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chase the property for less than its value and in a manner in which the trustee had no authority to sell, it is competent for the party alleging the trust to prove it by the terms of the contract and declarations of the trustee at the time the property was placed in his hands, even though such contract and declarations were made in the absence of the alleged fraudulent purchaser.

ERROR to the district court for Richardson county.
Tried below before BROADY, J.

Frank Martin, for plaintiff in error.

Isham Reavis, E. W. Thomas, and A. Schoenheit, for defendant in error.

REESE, J.

This is an action of replevin for a stock of goods. The petition is in the usual form alleging the ownership of the goods. The action was originally brought against the sheriff, who held them under an order of attachment. Upon motion of the sheriff, the attachment plaintiff was substituted as defendant, and is defendant in error in this court. The substituted defendant (Heater) filed his answer, the allegations of which are in substance that the sheriff who had possession of the property held by virtue of an order of attachment issued in an action wherein Heater was plaintiff and Donald Brothers and Shelly were defendants. The right of possession and ownership of Shelly were denied, and it was alleged that on the 26th day of January, 1884, he, Heater, was engaged in the business of operating a store of general merchandise, carrying a stock of the value of five thousand dollars, and at that time he was indebted to various parties for goods bought, aggregating about three thousand five hundred dollars, and among his creditors was the firm of Donald Brothers, of Atchison, Kansas, to whom he owed \$506. That Donald Brothers

Shelly v. Heater.

and other creditors were pressing him for money, and being unable to pay them in any other way, at the instance and request of Donald Brothers, he entered into an agreement with them by which he executed to them a bill of sale for the goods and delivered the stock to them to sell out in the usual course of trade in the store where they were, the proceeds arising from the sale to be applied by them, first, to the payment of their debt, and afterwards to the payment of the other debts of the store until all were paid. The remainder to be paid to him "in extinguishment of the obligation incurred by them in the purchase of said stock of goods from him." The answer further alleges that it was agreed that Donald Brothers should secure him "for the purchase price of said goods and the faithful performance of their part of said agreement in the application of the proceeds of the sale of said goods to the payment of the debts, and the payment of the excess" to him and had agreed to execute to him a bond in the sum of five thousand dollars with sureties, conditioned upon such performance; and they thereupon employed him at a stipulated price per week to remain in the store and assist them in making the sales and also to see that the contract upon their part was duly performed. That relying upon their promise to perform the contract, he executed to them the bill of sale and delivered to them the possession of the store and goods on Saturday afternoon, the bond to be executed the following Monday. That plaintiff, Shelly, was a resident of the same town in which the store was situated, was in the store immediately after the transfer as well as during a part of Saturday night, and most of the day on Sunday, and during part of Sunday night, and was fully acquainted with all the facts of the transfer; and on Monday morning gave out and pretended to have purchased of Donald Brothers the entire stock of goods for \$2,100. This purchase is alleged to have been a sham and a fraud. That Donald Brothers left on Sunday night or

Monday morning without executing the bond agreed upon, but that before going they transferred the whole stock to Shelly in violation of the rights of defendant and his other creditors. That Donald Brothers and Shelly confederated to cheat defendant by taking advantage of his necessities and by means of the fraudulent sale to Shelly. That thereupon he had instituted a suit in equity against Donald Brothers and Shelly, reciting the facts, giving the names of his creditors for whose benefit the transfer was made, praying the appointment of a receiver to take charge of the goods that they might be sold and the proceeds brought into court and distributed equitably among his creditors, the sale to Shelly set aside as fraudulent, and that he had caused an order of attachment to issue and the goods attached as the property of Donald Brothers. That Shelly having full knowledge of the alleged fraud, he acquired no title to the goods and they were subject to the levy of the attachment as their (Donald Brothers) property, etc.

A reply was filed denying the allegations of the answer, and the cause was tried to a jury who returned a verdict in favor of defendant. Judgment having been rendered on the verdict, plaintiff brings the cause into this court on error for review.

The testimony in the case is voluminous, and no good purpose could be subserved by a lengthy review of it in this opinion. It is sufficient to say that it tended to prove the allegations of the answer so far as the contract between Heater and Donald Brothers is concerned, and were the action one against Donald Brothers for damages it might be sustained. But so far as Shelly is concerned the proof is not of that character by which a fraudulent purchase is generally proven. It appears that Shelly and Heater were the only merchants in the village, and that Donald Brothers threatened selling the goods at auction, or if at retail, much below the usual prices, and Shelly did not desire such ac-

tion to take place, and sought buyers for the goods who would sell in the regular way without "slaughtering prices," as it was termed. Failing to find a purchaser he purchased the goods himself. The bill of sale from Heater to Donald Brothers stated a consideration of \$1,163.68. As the question of the participation of Shelly in or knowledge of any fraudulent intent on the part of Donald Brothers must be resubmitted to a jury, it is not deemed expedient to discuss that question further.

On the trial of the cause the court gave the following instruction to the jury, being number one of those asked by the defendant:

"The jury are instructed that if you find from the evidence that Donald Brothers got the goods in question from Heater under a contract with him that they should sell the same, and out of the proceeds, after paying all necessary expenses, pay off and discharge the debt which Heater then owed for said goods and return the balance to Heater, and if you further find that Shelly, when he got the goods from Donald Brothers, knew of such arrangement, or had knowledge of facts sufficient to put a man of ordinary prudence and discretion upon inquiry, which inquiry if properly pursued would have led to a knowledge of such arrangement, then your verdict should be in favor of Heater, and you should assess the amount of his recovery at the amount claimed in the order of attachment offered in evidence. Not exceeding, however, the value of the goods attached."

To the giving of this instruction the plaintiff excepted. The same propositions are substantially stated in other instructions given, but they need not be quoted here as the foregoing is deemed sufficient.

According to our view of the case this instruction was erroneous. By it the jury are virtually instructed that if Donald Brothers had received the goods from Heater under a contract that they should sell them and apply the proceeds to the payment of Heater's debts, and return the

excess to Heater, and that Shelly knew or might have known of such an arrangement, the verdict should be against him and he must lose the goods. The instruction is framed to cover the whole case. The jury are told to return a verdict for Heater if they find certain things to exist, and hence it could not be corrected by any other instruction which the court might give. Every element of fraud or bad faith is left out. If that contract was made, and Shelly knew or might have known of it, the verdict must be against him without reference to his good faith in purchasing or the good faith of Donald Brothers in selling for a good price, or accounting for the proceeds under the contract. No reference is made to the manner of selling. Although they might be sold in strict accordance with the contract, yet if Shelly knew or by inquiry could have known of the contract the verdict must be in favor of Heater. The instruction is deficient in not informing the jury that they must find that the goods were sold in violation of the trust, if any existed, and that Shelly knew or might with proper prudence and diligence have known that the trust was being violated in the sale to him, and that Donald Brothers had no authority to sell in that way.

It is insisted with considerable of earnestness by plaintiff in error that the court erred in allowing the witnesses for defendant when on the witness stand to detail the contract made and conversations had in the absence of Shelly between Heater and Donald Brothers in the transfer of the goods from Heater to them. In this we do not think the court erred. It was incumbent upon defendant, according to his theory of the case, to establish the trust relation of Donald Brothers to the property and toward Heater. This could only be done by the terms of the contract under which they held the goods and the circumstances attending the purchase. The contract was made before Shelly was approached by Donald Brothers, and of course made in his absence. If defendant succeeded in establishing the trust

relation, then he must proceed further and show that the trust had been violated. This would not yet entitle him to recover as against Shelly. The fraud and confederation on his part must yet be shown, else no verdict could be returned against him. Donald Brothers held the title to the goods. They had authority to sell. If that authority was coupled with a trust it could only be shown by proving the creation of it at the time of or prior to the transfer. It was competent to show this by proving the contract made with them.

For the error in giving the instruction above referred to the judgment of the district court is reversed and a new trial granted.

REVERSED AND REMANDED.

THE other judges concur.

THE BURLINGTON AND MISSOURI RIVER RAILROAD
COMPANY IN NEBRASKA, APPELLANT, v. KEARNEY
COUNTY, APPELLEE.

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1. **Petition Defective: FILING ANSWER NO WAIVER.** When the facts stated in a petition do not constitute a cause of action the filing of an answer is not a waiver of that defect. *O'Donohue v. Hendrix*, 13 Neb., 256.
2. ———. If a petition fails to state a cause of action it will not support a judgment.
3. ———: **OMISSIONS: PRESUMPTION.** Where there is an omission to state a material fact in a petition, one necessary to show a cause of action, the presumption is that it does not exist. *B. & M. R. R. Co. v. York County*, 7 Neb., 487.
4. ———: **CASE EXAMINED.** Petition examined, and found not to state a cause of action.

APPEAL from Kearney county. Heard below before
GASLIN, J.

Marquett & Deweese, for appellant.

J. M. Stewart, A. J. Poppleton, and Harwood, Ames & Kelly, for appellee.

REESE, J.

This action was brought to restrain the collection of certain taxes levied by the commissioners of Kearney county upon the property of the plaintiff for the year 1879. It is claimed that the taxes in question are illegal for want of authority on the part of the commissioners to levy them. Upon the trial of the cause in the district court a part of the relief prayed for was granted and the injunction made perpetual as to that part. But a part being refused and the injunction dissolved as to the part so refused, the plaintiff appeals.

By the brief of counsel for defendant it is strongly insisted that plaintiff has received all the relief to which it is entitled under the allegations of its amended petition, and that no cause of action is stated for any further relief. If this be true, it would serve no good purpose to examine the questions presented by the briefs and arguments of counsel upon the other features discussed by them.

The allegations of the petition may be briefly but fairly stated as follows: That it is a corporation duly organized under the laws of the state, and is the owner of the property (land) described in the schedule attached, and which was assessed for the year 1879, at the sum of \$31,179. That it is also the owner of a railroad running through the county of Kearney for a distance of $14\frac{68}{100}$ miles, which was assessed by the state board of equalization for said year at the sum of \$8,032 per mile. That on the 7th day of July of that year the board of county commissioners made the following levies of taxes:

For State Purposes—

General fund, 4 mills on the dollar.

Sinking fund, $\frac{1}{8}$ of one mill on the dollar.

School fund, 1 mill on the dollar.

University fund, $\frac{1}{8}$ of one mill on the dollar.

For County Purposes—

General fund, 10 mills on the dollar.

Sinking fund, 31 mills on the dollar.

Bridge fund, 2 mills on the dollar.

Court-house fund, 7 mills on the dollar.

School purposes, upon the property of school district number one, 30 mills on the dollar.

The recitals copied from the county commissioners' record of the levy show that the question of levying the tax known as court-house tax was by the direction of a vote of the people of the county at an election held on the 31st day of May, of the year 1879, upon a proposition submitting the question of raising by taxation and appropriating the sum of \$2,247 to aid in the construction of a court-house at Minden.

With reference to the school district tax, the petition alleges that the "board had no authority to levy for school purposes a tax in excess of twenty-five mills on the dollar valuation."

It is further alleged that the taxes levied for county purposes aggregated fifty mills on the dollar valuation, and that at the time of making the levy, "there were outstanding, as plaintiff has been informed and verily believes, indebtedness against said county (amounting to) seventy-four thousand dollars, of which fifteen thousand dollars were debts contracted and obligations incurred since the first day of November, 1875, for the payment of none of which the commissioners were authorized to levy a sinking fund. That all of said levies for county purposes were made by said commissioners of said county and by no other person or corporation, and that of said levy of fifty mills at least

thirty mills was excessive and more than said commissioners were authorized to levy. The said levy of fifty mills on dollar valuation on the property of said county were not made for the purpose of paying any indebtedness which accrued prior to November 1st, 1875."

"Plaintiff, therefore, under the advice of counsel, submits that the said levies so made and referred to were made without authority of law and are void. That said commissioners had no power or authority to levy said tax for said purpose, and that the same are in contravention of the constitution and the statutes of the state of Nebraska, and are in excess of the amount that the board of county commissioners are authorized to levy."

It is further alleged that as against the lands described in the petition, there is charged for the year 1879, taxes amounting to \$2,137 and that of that amount at least \$935.37 is in excess of the amount of taxes which should be charged against said lands, and which was so charged and levied without any authority. That against the railroad there is charged for the year 1879 taxes amounting to the sum of \$8,767.56, of which amount at least the sum of \$3,617.61 is in excess of the legal amount which should have been so charged, and is in excess of the amount authorized to be levied in accordance with the statutes and constitution of the state. That on the 28th day of April, 1880, the plaintiff tendered and paid to the county treasurer \$5,804.24 and on the 20th day of October, 1880, it tendered and paid \$573.23, which included interest, and which was more than the amount of legal taxes justly due from the plaintiff for said year 1879.

It is further stated that plaintiff is entitled to the relief demanded, which consists in restraining defendant from collecting the excessive taxes; that unless defendant is restrained the treasurer will proceed to sell the property of plaintiff and issue certificates and deeds to the purchasers, which will create a cloud upon its title, etc. Prayer for injunction in the usual form.

The answer is a general denial. Upon trial the court found that the tax in school district number one was excessive, and reduced it to twenty-five mills; holding with the plaintiff that all over that amount should be enjoined. This being the case no further notice need be taken of the school tax. The court also found that two mills of the court-house tax was excessive and void, and the injunction as to that was made perpetual.

If the facts stated in the petition do not constitute a cause of action the filing of an answer does not waive such defect. *O'Donohue v. Hendrix*, 13 Neb., 255. Neither are any defects in the substance of the petition cured by the answer (*Haggard v. Wallen*, 6 Neb., 272), if such defects exist, as the answer contains no affirmative allegations.

If the petition fails to state a cause of action it will not support a judgment. *Thompson v. Stetson*, 15 Neb., 112.

The petition, then, must stand unaided by any other pleading or proceeding in the case, and to it alone our attention must be directed.

It is alleged that the outstanding indebtedness of the county at the time of the levy was \$74,000, but of which \$15,000 were debts contracted and obligations incurred since the 1st day of November, 1875. It appears, then, that the restriction of section five of the article of the constitution on revenue and finance, by which the levy is restricted to "one and a half dollars per one hundred dollars valuation" has no reference to \$59,000 of this indebtedness. Neither does this limitation apply to indebtedness contracted after the first day of November, 1875, if the tax is authorized by a vote of the people of the county. There is no allegation anywhere in the petition that the levy to pay the \$15,000 of indebtedness referred to was not by the authority of a vote of the people. If such were the case, the interest at least of the whole of the \$74,000 indebtedness referred to should be paid by the levy of the proper tax, and if any part of said indebted-

ness was due such part should also be provided for by taxation. The petition is silent as to these particulars, and it must be construed against the pleader to the extent that where there is an omission to state material facts the presumption is that such facts do not exist. *B. & M. R. R. Co. v. Lancaster County*, 4 Neb., 307. *Same v. York County*, 7 Id., 493. *School District No. 16 v. School District No. 9*, 12 Id., 242. It is true it is alleged that the commissioners were not authorized to levy a sinking fund tax for the payment of any of this debt, but that allegation is not enough. No reason is alleged why this authority did not exist, and as we have seen, the presumption is, that no reason existed. If it was a bonded debt the fund was properly denominated a sinking fund. *U. P. R. R. Co. v. Buffalo County*, 9 Neb., 458. *Same v. Dawson Co.*, 12 Id., 256. The debt is not attacked by any allegation which would tend to question its validity. The presumption is the debt was a just and valid one. If so, the usual way of paying such is by taxation.

It is alleged that "of the levy of fifty mills at least thirty mills was excessive, and more than the commissioners were authorized to levy," and that the levy of fifty mills was not made for the purpose of paying any indebtedness which accrued prior to November 5, 1875. As the fifty mills was the whole tax levied, this allegation would seem to be at least *modified* by the allegation of the \$74,000 indebtedness. But be that as it may, the validity of a part of the tax is conceded and no reason is given why the thirty mills referred to is void or illegal. Nor what part of the tax is sought to be attacked. The allegation "under advice of counsel" that the levies were made without authority of law, and are void, and that the commissioners had no authority to levy a tax "for said purpose," cannot aid the matter. It is the opinion of the writer that the taxes necessary to pay indebtedness existing before the 1st day of November, 1875, and the taxes necessary to pay

indebtedness contracted since that time, when authorized by a vote of the people, are not to be considered in connection with the limitation of the constitution above referred to. However that may be, it is very clear that no such facts are shown as would lead to the suggestion that the taxes were unlawful were it not for the statement of the conclusions of the pleader. Much is said in the briefs concerning certain funding bonds of the county, but we look in vain for any reference to them in the petition. These funding bonds are spoken of in the brief as issued "by special act of March 8, 1873." The petition alleges "that the said levy of fifty mills on the dollar valuation on the property of said county were not made for the purpose of paying any indebtedness which accrued prior to November 1, 1875." The petition evidently does not refer to any such bonds.

From a very careful examination of the petition we are wholly unable to see that the plaintiff is entitled to any further relief than was afforded by the district court. Eliminating the five mill school tax and possibly the two mills court-house tax, which were held illegal by the district court, and the petition was clearly obnoxious to a general demurrer, and had the district court granted the full relief prayed for it would have been error.

The decree of the district court must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

518 SUPREME COURT OF NEBRASKA.

B. & M. R. R. Co. v. Kearney County. Flynn v. Jordan.

B. & M. R. R. Co. IN NEBRASKA, APPELLANT, v.
KEARNEY COUNTY, APPELLEE.

REESE, J.

This action was commenced for the purpose of restraining the collection of certain taxes levied by the county commissioners for the year 1878.

A portion of the taxes were held void by the district court, and as to them the injunction was made perpetual. As to the remainder the temporary injunction was dissolved. Plaintiff appeals. The same questions are presented and the same conclusions reached as in the preceding case of this plaintiff against this defendant. The decree of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

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JOHN FLYNN ET AL., PLAINTIFFS IN ERROR, v. WIL-
LIAM E. JORDAN ET AL., DEFENDANTS IN ERROR.

1. **Practice in Supreme Court: QUASHING BILL OF EXCEPTIONS.** A bill of exceptions not certified by the clerk of the trial court as being a part of the record in the said court, nor as being the original bill of exceptions in such case, and which appears never to have been filed by or presented for filing to the clerk of such court, will be quashed on motion.
2. **Replevin: EVIDENCE.** Where in an action of replevin the defendant claims to be the owner of the property or that the right to the possession thereof is in him, and prays a return of the property or a judgment for its value, proof by the plaintiff that defendant was in the possession of the property at the time of the commencement of the action, *Held*, To be unnecessary.

ERROR to the district court for Seward county. Tried below before NORVAL, J.

Leese Brothers, for plaintiffs in error.

R. S. Norval, for defendants in error.

COBB, CH. J.

This was an action of replevin brought by the defendants in error against the plaintiffs in error and one Daniel Doody for the possession of one brown mare of the value of eighty dollars. There was a trial to a jury, which found by their verdict "that at the commencement of this action the plaintiffs were the owners of the property described in the petition, and that the defendant, John Flynn, unlawfully detained the same; that the defendant, Doody, was not in the possession of the property when this action was commenced, and we do assess to the plaintiffs against the defendant, Flynn, damages at one cent."

Judgment having been rendered on the said verdict and a motion for a new trial overruled, the cause was brought to this court by the defendant, John Flynn.

In this court a motion was made by the defendants to quash the bill of exceptions, and the cause was submitted on said motion and generally.

The following are the grounds upon which the motion is founded :

"1. Because the said bill of exceptions was never filed in the district court of Seward county, nor was the same ever made a part of the record in said cause.

"2. Because the said bill of exceptions is not authenticated by the certificate and seal of the clerk of the district court of said county; that no certificate of the clerk of said district court is attached to said bill of exceptions or the transcript in said case, showing that it is the original bill of

exceptions, or that it is a copy of the original bill of exceptions.

"3. Because said bill of exceptions was never filed or offered to be filed with the clerk of the district court as the bill of exceptions in said cause.

"4. Because said bill of exceptions was not reduced to writing and presented to the defendants in error and allowed by the judge within the time allowed by law."

From a thorough inspection of the record as well as from the affidavit of George A. Merriam, clerk of the district court of Seward county, it fully appears that that part of the record in this case which purports to be a bill of exceptions was attached to the transcript of the record proper after the same left the office of the clerk of said district court, and never was either officially or in point of fact within the hands or custody of said clerk or within his office.

The statute, section 587a of the civil code, provides for the attaching of the original bill of exceptions to the transcript of proceedings, etc. But the succeeding section, 587b, provides "that when the original bill or bills of exception, or testimony in equity cases, is so as aforesaid made a part of a transcript or record for the supreme court, the clerk shall state such fact in his certificate thereto and omit to certify that the same have been copied into such record or transcript." The certificate of the clerk attached to the papers in the case at bar is no attempt at a compliance with the provisions of the above section, and while as a matter of fact the writer knows that the said paper purporting to be a bill of exceptions was signed by the judge of the district of which Seward county is a part, yet he owes such knowledge solely to the fact of his happening to be acquainted with that gentleman's handwriting.

The law-making power has gone to the very frontier of liberality—not to say of looseness—in allowing the use of

the original bills of exceptions in the supreme court, when properly certified up for that purpose, and I do not think that it would be safe for the court to dispense with their proper authentication. The motion to quash must therefore be sustained.

The points made in the petition in error must therefore be examined by reference to the record, without the aid of the bill of exceptions. Those are as follows :

1. The court erred in giving to the jury instruction No. 6.
2. The court erred in overruling the motion for a new trial.
3. The judgment was given for the plaintiffs below, when it should have been given for the defendant.

Instruction No. 6, above referred to, is in the following words :

"6. It is not necessary that the actual possession of the mare at the commencement of this action was in the defendants, or either of them ; if the mare was in the constructive possession of the defendants or either of them at that time would be sufficient so far as that is concerned. If before this suit was commenced the mare was in plaintiff's stable, and while there and before this suit was commenced Flynn was asked to give up the possession of the mare, and he refused to do so, then the mare would, in law, be considered in the constructive possession of Flynn."

The bill of exceptions being out of consideration, this instruction must be examined only in the light of its own language, the pleadings, and the verdict, and if by such light and upon any reasonable state of facts it is consistent with the law, it must be sustained.

The petition alleges that the plaintiffs are the owners and entitled to the possession of the mare, describing her ; that said defendants wrongfully detained said personal property from the possession of the plaintiffs, and have so wrongfully detained the same for the space of three days, to the damage of the plaintiffs in the sum of five dollars, etc.

The defendants by their answer denied the said petition, and each and every allegation therein contained. They ask for "a return of the property replevied in this action, or for the value thereof as provided by law, and costs."

I think that this answer, taken altogether, must be held to amount to a claim of ownership in, or at least to, the right of the possession of the property; otherwise, a claim of its return or for a judgment for its value would be utterly inconsistent. Wells, in his work on Replevin, cited by counsel for defendant in error, speaking of waiver of demand by defendant, says: "Where the defendant sets up a claim of ownership and demands a return of the goods, this claim is inconsistent with any hypothesis that he would surrender them on demand, and will obviate the necessity of proving demand," citing cases; and continues: "And the rule may be stated as general, that when the defendant contests the case all through the trial on a claim of superior right to the property, he cannot afterwards set up a want of demand as a reason for his failure to surrender. When he desires to rely on a want of demand he should show a willingness to deliver the goods upon a proper one, and that none had been made."

The above reasoning applies to the case at bar. The ownership of the property being the issue on trial, it would be inconsistent for the defendants, after demanding a judgment for its return, or for its value, to predicate a defense upon their want of possession of the property at the time of the commencement of the suit.

That part of the instruction which refers to the mare being in the plaintiff's stable before the suit was commenced, is scarcely intelligible without, or even with, the bill of exceptions, and yet I do not think it could have misled the jury from the sole point for their consideration, to-wit, the right to the possession and ownership of the mare.

While it is doubtless the law, that possession of the prop-

State v. Gurney.

erty by the defendant is an essential part of the cause of action in replevin, yet such possession may be constructive only. And I am unable to say that such possession of the mare, either actual or constructive, could not have been held by the defendants, or either of them, "in the plaintiff's stable."

I am unable to say that the district court erred in giving the instruction complained of. Nor, without the bill exceptions, can I say that the court erred either in overruling the motion for a new trial or in rendering judgment for the plaintiffs instead of the defendants.

The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. S. HY. SORNBERGER, v. J. H. GURNEY, CO. JUDGE OF ANTELOPE COUNTY.

County Judge: DISQUALIFICATION. The disqualification from acting on the part of a probate or county judge mentioned in sections 3 and 35 of chapter 20, Comp. Stat., does not extend to such official acts of said judges as are merely ministerial, such as filing papers and issuing process.

ORIGINAL application for mandamus.

S. Hy. Sornberger, pro se.

J. H. Gurney, pro se.

COBB, CH. J.

The question presented in this case is, whether a county judge who is also a practicing attorney at law can refuse

to issue a summons and order of replevin in a case within the jurisdiction of the county court upon an application properly made to him, for the reason that he has been engaged as attorney to foreclose a chattel mortgage on the same property by another party.

Section 2, of chapter 20, of the Compiled Statutes, provides that, "Probate judges in their respective counties shall have and exercise the ordinary powers and jurisdiction of a justice of the peace, and shall in civil cases have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding five hundred dollars exclusive of costs, and in actions of replevin where the appraised value of the property does not exceed that sum; and the provisions of the code of civil procedure relative to justices of the peace shall, where no special provision is made by this subdivision, apply to the proceedings in all civil actions prosecuted before said probate judges." By the provisions of a subsequent act the said jurisdiction is increased to the sum of one thousand dollars. *Id.* Laws 1883, Ch. XXXVIII. Section 3 of said chapter provides that, "The courts of probate in their respective counties shall have exclusive jurisdiction of the probate of wills, the administration of estates of deceased persons, and the guardianship of minors, insane persons, and idiots; *Provided*, No judge of probate shall act in any case or matter where he is next of kin to the deceased, nor where he is legatee or devisee under a will, nor where he is named as executor or trustee in a will, or is one of the subscribing witnesses thereto, nor where he is related to any party in interest in any case before him by consanguinity or affinity, or has such an interest therein as would exclude him from acting as a juror in such case or matter, or where he has acted as attorney or counsel in any case or matter before him."

Section 35 provides, "When any probate judge shall be disqualified from acting in any cause or matter before him,

or is temporarily absent from the county, the county commissioners may appoint a competent and disinterested person to act in place of such judge, in such case or other matter, during such absence or disqualification."

Section 20 of said chapter provides that, "All writs, citations, and all process in civil actions issuing out of any probate court shall be under the seal thereof, and be signed by the probate judge."

It will thus be seen that the statute recognizes the existence of cases in the probate court in which the probate judge is disqualified from acting in his judicial capacity by reason of his having acted as attorney or counsel therein, and has provided for the appointment of persons to temporarily perform such services, but such disqualification does not, either by the letter of the statute, nor in the nature of the duty to be performed, apply to the acts or duties of such judges as are merely ministerial, such as the issuing of an order of replevin.

Were the view of the law urged by the respondent correct, that the fact of his having been engaged as attorney by a party in interest in the property sought to be replevied rendered him disqualified to issue the summons and order of replevin demanded by the relator, then it would follow that the law would not permit a probate judge to act as attorney, and thereby close the doors of this most popular court of justice to such suitors as he might be retained against. For it should be borne in mind that it must be "a cause or matter before him" in which he must be "disqualified from acting" before the county commissioners may appoint a competent person to act temporarily in place of such judge.

It follows from the above considerations that a peremptory mandamus must issue commanding the respondent to receive the affidavit of the relator and docket the cause as required by him, and issue the summons with the additions thereto, as required by statute. Thereafter such pro-

ceedings may be had in the case as are provided for by law.

WRIT ALLOWED.

THE other judges concur.

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URIAH W. LORD, PLAINTIFF IN ERROR, V. THE STATE
OF NEBRASKA, DEFENDANT IN ERROR.

1. **Adultery: INDICTMENT.** An indictment under Sec. 208 of the criminal code, against a husband for deserting his wife and living and cohabiting with another woman in a state of adultery must allege the offense substantially as in the statute.
2. ———: **WIFE COMPETENT WITNESS.** Under a statute permitting a husband or wife to testify in a criminal proceeding for a crime committed by one against another, *Held*, That on the trial of a husband on an indictment for adultery, the wife was a competent witness against him.
3. **Marriage, How Proved.** Marriage may be proved by an eye-witness, and if followed by cohabitation its validity will be presumed.

ERROR to the district court for Brown county. Tried below before TIFFANY, J.

D. A. Holmes and J. F. Burns, for plaintiff in error.

William Leese, Attorney General, for the State.

MAXWELL, J.

The plaintiff in error was convicted of adultery in the district court of Brown county, and sentenced to imprisonment in the county jail for the term of one year, and to pay a fine of \$200, and costs. But two errors are relied upon in the plaintiff's brief: *First*, That the indictment is in-

sufficient: *Second*, That the court erred in permitting the wife of the plaintiff in error to testify against him. The following is a copy of the indictment:

"THE STATE OF NEBRASKA, }
BROWN COUNTY. }

"Of the November term of the district court of the ninth judicial district of the state of Nebraska, within and for Brown county in said state, in the year of our Lord one thousand eight hundred and eighty-three, the grand jurors chosen, selected, and sworn in and for the county of Brown, in the name and by the authority of the state of Nebraska, upon their oaths present: That Uriah W. Lord, late of the county aforesaid, on the first day of April, in the year of our Lord one thousand eight hundred and eighty-three, in the county of Brown and state of Nebraska aforesaid, the said Uriah W. Lord, being then and there a married man, to-wit, being then and there married to one Hannah Lord, on the said first day of April, in the year aforesaid, and from said day continually, until the 28th day of November, A.D. 1883, in the county of Brown aforesaid, did unlawfully live and cohabit in a state of adultery with one Celia Amit, a female woman."

Sec. 208 of the criminal code provides that "If any married man shall hereafter commit adultery, or desert his wife and live and cohabit with another woman in a state of adultery, or if any married man living with his wife shall keep any other woman and wantonly cohabit with her in a state of adultery, * * * every person so offending shall be fined in any sum not exceeding two hundred dollars, and be imprisoned in the jail of the county not exceeding one year."

It will be seen that the statute provides for three classes of cases: *First*, Where a married man commits adultery; *Second*, If he desert his wife and live and cohabit with another woman in a state of adultery; *Third*, If, living with his wife, he shall keep any other woman

and wantonly cohabit with her in a state of adultery. This section is copied from the criminal code of Ohio, and the second and third provisions as numbered above seem to have been passed by the legislature of that state in 1831. Warren's Cr. Law, 607. Wharton's Cr. Law, § 2646. The indictment in this case is an attempt to charge an offense in the second class, viz., a married man deserting his wife and living in a state of adultery with another woman. To do this, the charge should be in substance, that the plaintiff, being then and there married to [*name of wife*], did then and there desert his wife, and thence continually, for a space of time, did live and cohabit with another woman [*naming her*] in a state of adultery, and that during such time the accused was a married man, and the person with whom he lived and cohabited was not his wife. A good form of indictment under this provision of the statute is found in Warren's Cr. Law, 615-616. The statute makes the desertion of the wife a part of the offense, and it should be charged. While it is the duty of the court to give words their ordinary meaning, and—where the language of the statute is not used in charging the offense, but other words meaning the same thing—to sustain an indictment, yet there must be a distinct charge of an offense declared to be such by statute, and the court cannot supply by intendment material facts left out of the indictment. As the indictment is defective in some of these particulars, the motion to quash it should have been sustained.

2. Section 331 of the civil code provides that, "The husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other; but they may in all criminal prosecutions be witnesses for each other." At common law a wife could not be a witness against her husband. And there is a direct conflict in the authorities under statutes similar to ours, as to her right to be a witness in a criminal proceeding for a crime committed

by her husband against her. This is the first time the question has been presented in this court, and it is therefore necessary to ascertain the intention of the legislature in passing the section above referred to, and give force to that intention. The statute makes it an offense for a husband to desert his wife and live and cohabit with another woman. If the husband is prosecuted for the offense, the prosecution certainly would be a criminal proceeding for a crime committed against the wife. The word "crime" is frequently used to designate gross violations of law in contradistinction to misdemeanors; but in its broad sense it means any violation of law. Webster's Dictionary, 312-313. And in our view, it was intended by the legislature to include the offense here charged; and the ends of justice will be best subserved by permitting the wife to testify. This is the rule adopted in Iowa under a similar statute. *State v. Bennett*, 31 Iowa, 24. *State v. Sloan*, 55 Id., 219. *State v. Hazen*, 89 Id., 648. In Texas also: *Morrill v. State*, 5 Tex. Ct. App., 447. *Roland v. State*, 9 Id., 277.

A third question arises out of the second, viz., the mode of proving the marriage. At common law, in trials for polygamy, adultery, and criminal conversation, proof of marriage must be made by direct evidence or its equivalent. 2 Greenleaf Ev., § 461. 1 Phillips on Ev. (4th Am. Ed.), 631-632. But even at common law, proof of a marriage having been celebrated by a person who was present was sufficient. 1 Phillips on Ev., 632. *Hemmings v. Smith*, 4 Doug., 83. Any person who was present when the marriage took place, is a competent witness to prove the marriage; and it is enough that he is able to state that the marriage was celebrated according to the usual form, and he need not be able to state the words used. *Fleming v. The People*, 27 N. Y., 329. In this state no proof of the official character of the person performing the ceremony is necessary; and his certificate, or a copy of the record, duly certified, will be received in all courts and places as

presumptive evidence of marriage. In the absence of evidence to the contrary, the statute of Pennsylvania will be presumed to be like our own. *Moses v. Comstock*, 4 Neb., 519. Story's Conf. of Laws, § 637. The marriage was abundantly proved, and was followed by the parties living together as husband and wife for more than twelve years. They evidently regarded it as a valid marriage, and such, we have no doubt from the evidence before us, it was. For the sole reason that the indictment was insufficient, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE, EX REL. JAMES L. HILTON, v. DAVID
TOWNSEND.

Exemption: HOMESTEAD. A person possessed of a homestead on which he resides, although his title may be a contract of sale and the property encumbered for nearly its entire value, is not entitled to \$500 in addition in lieu of a homestead, nor can he pledge his homestead as security for a debt, and while possessed of the homestead claim \$500 in lieu thereof.

ORIGINAL application for mandamus.

Joel Hull, for relator.

Stewart & McPheely, for respondent.

MAXWELL, J.

The relator is the head of a family and a resident of Axtell, in this state, and prior to the 7th day of February

last was engaged in the business of druggist in the town of his residence. On that day McCord, Brady & Co., of Omaha, caused an execution to be issued on a judgment in their favor against the relator, and levied upon a portion of the stock of goods belonging to him in his drug store. He thereupon filed an inventory under oath of what he claimed was all his property with the officer holding the execution, and alleged in such inventory that he had neither lands, town lots, nor houses subject to exemption as a homestead under the laws of this state, and, therefore, that he was entitled to goods to the value of five hundred dollars in lieu of a homestead. Afterwards he brought this action against the defendant, who held the execution, to compel him to call appraisers to appraise the property described in the inventory. An alternative writ was allowed, to which an answer was filed, and a large amount of testimony taken, much of it upon points not involved in this case, and it need not be reviewed at length. It appears from the testimony that in January last the relator was possessed of a homestead in the village where he resides, which he states in his testimony was worth about \$500 or \$600; that the title was a contract from the town company, and some portion of the purchase price was still unpaid; that there were liens and incumbrances against it amounting to about \$500. That at the date last mentioned his creditors were pressing him, and it was agreed between him and his attorney that he should assign the contract from the town company for the lot in question to such attorney as security for fees then due and thereafter to become due for services to be rendered; that in pursuance of such agreement the assignment was made, and upon the strength of it the relator claims the \$500 exempt in lieu of a homestead. The real question in the case, therefore, is his right to goods the value of \$500 in lieu of a homestead.

In *State, ex rel. Kahoon, v. Krumpus*, 13 Neb., 321, the relator owned a small house or shanty in Omaha in which he

resided, which was mortgaged for its full value, yet it was held that he was not entitled also to an exemption of \$500 in lieu of a homestead. It is said, "The fact of it being incumbered does not take from it the character of a house or homestead, nor render it subject to attachment and sale against his will."

And in *Axtell v. Warden*, 7 Neb., 182, it was held that a person occupying a homestead under the laws of the United States was not entitled, in addition, to an exemption of \$500, although the title to the homestead was in the United States. These cases would seem to be decisive of this. It is not essential to a homestead that it shall be free from incumbrances, nor that the occupant shall possess the legal title. But an embarrassed debtor cannot be permitted to convey his homestead to his attorney or any one else as security, and retain property to the value of \$500 in lieu of such homestead. The courts will protect the rights of homestead and exemption as far as a liberal construction of the statute will permit; but the statute alone furnishes the measure of their authority, and declares what property shall be exempt. A debtor should be required also to act in good faith with his creditors, and if unfortunate and unable to pay his debts in full, apply his property not exempt towards the payment of his debts, and the exemption law should not be extended by implication to cover property not intended to be included therein. As the relator is married it is doubtful if the assignment made by him to his attorney is of any validity without the consent of the wife. *Bonorden v. Kriz*, 13 Neb., 121. But that question is not before the court. As the relator has a homestead he is not entitled to property to the value of \$500 in lieu thereof. The writ is therefore denied.

WRIT DENIED.

THE other judges concur.

ABRAHAM L. DEWITT, PLAINTIFF IN ERROR, V.
WHEELER & WILSON SEWING MACHINE CO. ET
AL., DEFENDANTS IN ERROR.

1. **Homestead.** The homestead law in force when a debt is contracted governs as to the rights of the creditor and debtor in that case.
2. ———: **STIPULATION CONSTRUED.** Where in a stipulation of facts it was agreed that the debt "accrued in the summer of 1877," a homestead law having taken effect on the 1st day of June of that year, *Held*, That as the word "summer" is frequently used to indicate the warmest season of the year, it will not be presumed that the debt accrued after the 1st day of June.

ERROR to the district court for Saline county. Tried below before POST, J., sitting for MORRIS, J.

Abbott & Abbott, for plaintiff in error.

M. B. C. True and *J. C. Smith*, for defendants in error.

MAXWELL, J.

In May, 1876, one R. F. Kortright executed a promissory note for the sum of \$90 to the Wheeler and Wilson Sewing Machine Co. On the twelfth day of August, 1878, said company recovered a judgment against Kortright for the sum of \$100 and costs, on said note. A transcript of said judgment was duly filed in the district court of that county on the fifteenth of that month. In July, 1876, Kortright executed a promissory note to Fuller and Johnson for the sum of \$98.25, and in December of that year they recovered a judgment thereon before a justice of the peace, a transcript of which judgment, in August, 1879, was duly filed in the office of the clerk of the district court of that county. In August, 1879, J. C. Norris recovered a judgment against Kortright, before a justice of the peace,

17	533
17	689
19	246
19	677
17	533
28	195
29	318
17	5
39	60
17	533
54	219

for the sum of \$10 and costs, on a debt which accrued in the summer of 1877. A transcript of the judgment was duly filed in the office of the clerk of the district court. On the fifth day of July, 1878, Kortright executed a promissory note to Hattie E. Burley for the sum of \$225, due in four years from date, with interest at twelve per cent. To secure the payment of this note Kortright and wife executed a mortgage upon eighty acres of land in Saline county. The note and mortgage were afterwards assigned to Henry E. Fletcher, who, in February, 1883, brought an action to foreclose the same, and Abraham L. DeWitt, Wheeler & Wilson, Fuller & Johnson, and J. C. Norris were made defendants. A decree of foreclosure was afterwards rendered, in which the judgments in question were held to be valid liens upon the premises. From that portion of the decree declaring the judgments liens on the land in controversy, the owner of the equity of redemption, Abraham L. DeWitt, appeals.

The case was tried upon a stipulation of facts, from which it appears that in 1876 "Kortright owned 80 acres of land in another part of the county, and occupied the same as a homestead;" that "he sold that and bought in the land in dispute July 5th, 1877;" that "on the fifth day of July, 1877, Robert F. Kortright bought the land described in the plaintiff's petition in fee, and with his then wife, Catherine E. Carmen, and her minor children by a former marriage, moved onto the same, and resided there as their home (having no other land or home) until early in the summer of 1878. He then rented the farm and moved into the city of Crete, same county, rented property, and opened a boarding house, and continued that business until about December 1st, 1878, when he moved back with his family on to the farm; that afterwards Mrs. Kortright brought an action for a divorce from her husband, and a decree was rendered in her favor about the year 1880, and granting her the land in dispute as alimony; that in 1881

she sold and conveyed said land to the plaintiff in error; that in 1883 Kortright conveyed his interest in said land to one Taylor, who afterwards conveyed to the plaintiff in error." It will be seen that all the debts except that to Norris were contracted before the homestead law of 1877 took effect, and the exemption law in force when they were contracted will govern as to the rights of the debtor and creditor. That is, that after a debt is contracted the legislature cannot diminish the rights of the creditor, nor take from the debtor property previously exempt to apply on that particular debt. *Dorrington v. Myers*, 11 Neb., 388. *Bills v. Mason*, 42 Iowa, 329. *Warner v. Cummock*, 37 Id., 642. The judgments, therefore, of Fuller & Johnson and Wheeler & Wilson were liens upon the homestead, and upon its sale and abandonment became operative. *State Bank v. Carson*, 4 Neb., 501. *Eaton v. Ryan*, 5 Id., 49.

2. It is stated in the stipulation of facts that the debt to Norris "accrued in the summer of 1877." The word "summer," strictly perhaps, includes only the months of June, July, and August, yet it is frequently used in a more general sense to indicate the warmest period of the year. Webster's Dictionary, 1325. The homestead law of 1877 took effect June 1st, 1877, and so far as appears the debt to Norris was contracted before that time. Error must affirmatively appear and will not be presumed. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	536
39	186
17	536
60	98

GEORGE C. HOBBIIE, APPELLEE, v. JOSEPH G.
ZAEPPFEL ET AL., APPELLANTS.

1. **Contract against Public Policy.** No court of law or equity will lend its assistance in any way towards carrying out an illegal contract; therefore such contract cannot be enforced by one party against the other, either directly, by asking the court to carry it into effect, or indirectly, by claiming damages or compensation for a breach of it. *Gould et al. v. Kendall et al.*, 15 Neb., 549.
2. **The Findings and Judgments** must be *secundum allegata* as well as *secundum probata*. *The Hoppet*, 7 Cranch, 388.

APPEAL from Washington county. Heard below before WAKELEY, J.

W. J. Connell, for appellants.

Congdon, Clarkson & Hunt, for appellee.

COBB, CH. J.

The first proposition which presents itself for consideration in this case is: Was the consideration for the note upon which this action was brought a legal and valid one as between the makers and the payee?

The consideration for the giving of the said note, with other notes, was expressed in the following written contract, which was introduced in evidence at the trial and preserved in the bill of exceptions, to-wit:

"For and in consideration of four thousand dollars in notes, secured by mortgages, given by J. Zaepffel, I hereby sell and assign to him an undivided half of my interest in the New Red Cloud tradership.

"It is understood between us that said notes are to be sold by C. L. Bristol, for a sum not less than two thousand dollars, for means with which to carry on the Indian trad-

Hobbie v. Zaepffel.

ing business at New Red Cloud; and that said notes are a joint debt, and are to be paid out of the profits of the business as soon as the stock of goods is paid for; and that all the profits of such business are to be applied to the liquidation of said notes as fast as received, except for necessary individual expenses of ourselves.

"It is further agreed and understood that C. L. Bristol is to give his time and attention, without charge or salary, to the business, and also, that with consent of J. W. Padlock, if there is sufficient business, that J. Zaepffel shall be employed at a reasonable salary, to be paid out of the profits of the business; that after the stock of goods is paid for, and the notes aforesaid are paid, the profits shall continue to be divided equally between us (C. L. Bristol giving his services without charge) during the term of the present license, and also during the term of any subsequent license.

"It is further agreed that if at any time J. Zaepffel may think his interests require it he shall have the right to take personal control of the business until such time as the notes aforesaid are paid.

"Witness our hands this 12th day of April, 1878.

"[SIGNED.]

C. L. BRISTOL,

"J. G. ZAEPFFEL."

If at the date of this contract the said C. L. Bristol was the holder of a license from the government of the United States to trade with the Indians at the New Red Cloud agency, as was evidently claimed by him, or elsewhere in the Indian country, then the consideration which he was to give and Zaepffel was to receive for the said note was a one-half interest in the franchise rights and privileges contemplated by such license.

Section 2129 of the Revised Statutes of the United States provides as follows: "No person shall be permitted to trade with any of the Indians in the Indian country without a license therefor from a superintendent of Indian affairs, or

served in the bill of exceptions, testified as follows: "I had several conversations with plaintiff, George C. Hobble, in reference to his taking an interest with me in the New Red Cloud Indian tradership; at last he told me that he would be the responsible party and did not feel like taking the risk but would like to make some money out of it if he could. It was finally proposed that he make a loan of two thousand dollars, for which he should receive four thousand dollars at the end of two years. This he was willing to do, but feared it could not be done legally. He was to have had security for such loan on the property of Joseph Zaepffel and wife.

"Then he (Hobbie) offered to loan two thousand dollars for two years, on condition that Zaepffel and wife should convey to him by absolute deed their Washington county farm, with the understanding that upon payment to him (Hobbie) of four thousand dollars he would reconvey said farm. This proposition Zaepffel refused to accept. The next proposition was that Zaepffel and wife should make two notes to me (C. L. Bristol) of two thousand dollars each, one of which was to be secured by a chattel mortgage on the property of Joseph G. Zaepffel, the other to be secured by a mortgage on Mrs. Zaepffel's farm in Washington county.

"These notes were to be endorsed by me to Hobbie, and sold to him (Hobbie) for the sum of two thousand dollars, and the securities to be duly assigned to him. Hobbie, Zaepffel, and myself were together when this matter was all talked over, and the agreement was finally made to consummate the loan in accordance with the above proposition. Hobbie knew that the only consideration to be received by Zaepffel and wife was a partnership with me in the New Red Cloud Indian tradership. He also knew that the appointment to that tradership was in the name of J. W. Paddock, and the interest I was to have was a partnership interest.

"The notes and mortgages were dated April 12, 1878.

"The notes were endorsed and the mortgages assigned immediately to Hobbie in presence of Zaepffel. * * * Hobbie and he (Hobbie) paid for the notes (amounting to four thousand dollars) two thousand dollars and no more. This whole transaction was had in accordance with the last above named proposition, and for the purpose of avoiding legal difficulties, and to enable him (Hobbie) to receive the four thousand dollars on the loan of two thousand dollars."

The defendant, Joseph G. Zaepffel, was sworn as a witness in his own behalf, and testified as follows:

Q. You are one of the defendants in this case, are you not?

A. Yes, sir.

Q. And the other defendant is your wife?

A. Yes, sir.

Q. Do you know the plaintiff, George C. Hobbie?

A. I do.

Q. How long have you known him?

A. Since this transaction. But previous to that I have known him by sight.

Q. In this transaction, when did you first see him, and how did you come to see him?

A. I knew him by sight. I believe I had my first conversation upon this subject in the street, so far as I remember.

Q. How did you happen to have the conversation?

A. I was anxious that he should go into the co-partnership with his capital. I tried to show him the advantages to him, and he said he would prefer to keep out of it and loan the money.

Q. How did you know anything about it?

A. Mr. Bristol told me that he approached Mr. Hobbie, and there was a probability that Mr. Hobbie would go into it.

Q. What further negotiation was there?

A. At that time there was no further negotiation. The further negotiation took place in the office of * * *

Q. By Mr. Manderson: Was that conversation when Mr. Hobbie was present?

A. Yes, sir; in your office. Mr. Bristol told me to come up and the papers would be made out and the loan arranged.

Q. By Mr. Manderson: Mr. Bristol and you and I were present?

A. Yes, sir. The substance was that Hobbie would advance two thousand dollars, and I should assign my farm to him. I said I would not do it. He said I would have the farm again on condition that I pay him four thousand dollars. I would not consent to the arrangement, and I left.

Q. By Mr. Connell: What further then occurred?

A. I saw no more of Mr. Hobbie until Mr. Bristol made arrangements with Mr. Hobbie in relation to the signing of these four thousand dollars of notes.

Q. Were you present?

A. No, sir.

Q. How did you come to give the notes and mortgage to Mr. Bristol?

A. Mr. Bristol told me what arrangements he made with Mr. Hobbie, and I was satisfied when he had his tradership that I could carry out the conditions.

Q. What was Mr. Bristol to give you for signing the notes and mortgage?

A. A half interest.

Q. By Mr. Manderson: I sent that in writing?

A. Yes, sir.

Q. By Mr. Connell: State what paper that is, if you know?

A. That is an agreement between Mr. Bristol and me. The defendant offers in evidence the agreement referred

to, dated April 12, 1878. Received without objection. (The paper hereinbefore copied.)

Q. The amount of notes stated is four thousand dollars. Was that the amount given? How do you explain that?

A. I don't know exactly, to-day; but I believe there is a mistake. The idea was that there was four thousand dollars to be given, and that the interest which was derived from the two thousand would make four thousand.

Q. What notes did you give for that agreement?

A. These notes that I signed; the first one that we secured by real estate, and then there are four notes of about \$380 each. They had to be paid every six months, I believe.

Q. You gave one note for two thousand dollars which is involved in this suit?

A. Yes, sir.

Q. And that was at twelve per cent interest?

A. Yes, sir.

Q. And four other notes at three hundred and eighty dollars each?

A. Yes, sir.

* * * * *

Q. For all of these notes state whether or not you received any consideration whatever, or did your wife receive any consideration whatever, except the agreement that you refer to?

A. We never got one cent's worth—neither my wife nor I—except this paper.

Q. What, if anything, do you know about Mr. Hobbie being made acquainted with these facts as to what you were to receive for the notes before you gave them?

A. My conversation with Mr. Hobbie only had relation to the fact that Mr. Bristol made him a proposition to enter into a partnership, and that he didn't accept it.

Q. What reason did he give for not accepting it?

A. Because he thought it was safer to stay in Omaha and loan his money.

Q. Was that before or after you gave the notes?

A. It was before the notes were signed.

I transcribe below so much of the testimony of the plaintiff (who was sworn as a witness on his own behalf) as bears on the point which we are now considering:

Q. When was you first approached in reference to this transaction?

A. Along early in 1878—just before this, I think; along in the early summer, may be.

Q. Where was it that you had the first interview with Mr. Zaepffel in regard to advancing money on purchasing paper?

A. I had no interview with the professor until after the transaction was completed.

Q. When and where was the first interview that you remember being had with the professor?

A. It was at the hotel—no particular interview. It happened sort of accidentally, and merely alluded to the fact that the matter was consummated; that was about all.

Q. What, if anything, did you know at that time with reference to Mr. Bristol having a license to trade at an Indian reservation?

A. Only what he intimated to me—that he had a pretty sure thing of getting a tradership of this kind; he was pretty certain of getting the appointment.

Q. How much money did you advance to Mr. Bristol for this purpose?

A. Two thousand dollars for this purpose.

Q. What did you receive?

A. I received a note of two thousand dollars and four other notes of three hundred and eighty dollars each. Three thousand five hundred and twenty dollars altogether.

Q. And these notes were secured by two mortgages that have been referred to?

A. Yes, sir.

Q. What was the security?

A. The note for \$2,000 was secured by the real estate mortgage on the farm property.

Q. The notes for \$1,520 were secured by a mortgage on the wine?

A. Yes, sir.

* * * * *

Cross-examined by defendants' counsel.

* * * * *

Q. Hadn't you had some talk with Mr. Bristol before you met Mr. Zaepffel about this proposed post tradership?

A. Yes, sir.

Q. Didn't you at first talk of taking a direct interest in that with Mr. Bristol?

A. That proposition was made to me.

Q. You knew at the time that he hadn't the post tradership, but expected he would get it?

A. I didn't know anything about it.

Q. You knew he hadn't it?

A. Not at that time.

Q. Didn't you know that he proposed to get it?

A. All I knew was what he told me; I had no knowledge upon the subject.

Q. You knew from what he told you that he would probably get it?

A. Yes, sir.

Q. But that he hadn't it at that time?

A. That was my understanding, that he had a sure thing.

Q. You didn't think he had a sure thing?

A. I certainly did.

Q. Why didn't you go in with him?

A. Because I didn't want to go into business with him. I didn't want to go into business with any such man.

Q. The objection was the man?

A. Certainly ; I had no objection to the business.

* * * * *

Q. How long had you been talking with Mr. Bristol about this post tradership and matters in connection with it before these notes were executed ?

A. Two or three months.

Q. How frequently would you have interviews with him before you saw Professor Zaepffel ?

A. When we casually met on the street, may be half a dozen times.

Q. Didn't you frequently see him in his or your office ?

A. No, sir.

Q. Didn't you ever meet him in either of your offices ?

A. I don't remember.

Q. You think your meetings were generally on the street ?

A. Yes; he lived near me.

* * * * *

Q. Did you propose to advance the four thousand dollars ?

A. That was his proposition to me.

Q. State why you had notes and mortgages made in the first place to Mr. Bristol. Why didn't you have them made to yourself direct ?

A. I cannot say; it was a proposition of Mr. Bristol's.

* * * * *

Q. Can you give any other reason than the one stated for having the note and mortgage given through Mr. Bristol ?

A. I didn't know of any other reason at the time.

Q. Was not the reason to get over the statute relating to usury ?

A. It might have been with Mr. Bristol.

Q. It was not with you ?

A. No, sir.

Q. Might it not have been ?

A. It might have been.

Q. You would not want to swear that that was not the purpose?

A. No, sir.

From an examination of the above evidence it can scarcely be doubted that the want of consideration for the making of the note was as well known to Hobbie at the time of its endorsement to him as it was to Bristol. I am not unmindful of the fact that the district court before whom this cause was tried rendered a decree for the plaintiff, and in holding, as I think this court must, that the plaintiff is chargeable with notice of all the facts connected with the inception of the note, we are in entire accord with the district court, which, having held the note to be usurious as between the plaintiff and the Zaepffels, must have done so on the ground that Hobbie had knowledge of the consideration, or rather of the want of consideration, for which the note was given. The following is the finding of the district court as copied from the record :

"The court finds that the defendants, Joseph G. Zaepffel and Elizabeth Zaepffel, executed and delivered to Cicero L. Bristol the note and mortgage sued on in this action, and that the same were duly assigned to the plaintiff as described in the plaintiff's petition. And the court further finds that the transaction was in fact a loan of money by plaintiff Hobbie to the defendant, Joseph G. Zaepffel, and that the same was usurious." * * *

Under the rule universally adhered to by this court, of sustaining the finding of the trial court as well as the verdict of the jury, except in cases where such finding or verdict is so unsustained by or contrary to the evidence as to be clearly wrong, the above finding would probably be upheld if it was in accordance with the pleadings. But in that respect it is clearly unsustained.

As we have seen, the plaintiff declares as the holder of a negotiable promissory note received by him before ma-

turity, for value, without notice of its invalidity. The maxim that the decree must be *secundum allegata* as well as *secundum probata*, says Chief Justice Marshall, "is essential to the due administration of justice in all courts. The rule is founded in sound reason and good sense, and is no doubt fully applicable to our present system of pleadings." Moak's VanSantvoord's Pleadings, p. 787, and authorities there cited.

But upon the facts as shown by the bill of exceptions I do not think there was any lawful consideration for the note, nor that the plaintiff is such *bona fide* holder as to entitle him to recover thereon under any condition of pleadings.

The judgment of the district court is therefore reversed and the cause dismissed.

JUDGMENT ACCORDINGLY.

The other judges concur.

CORDELIA W. HARMON, PLAINTIFF IN ERROR, v. CITY
OF OMAHA, DEFENDANT IN ERROR.

Municipal Corporation: DAMAGES BY FILLING IN STREET. A city is liable under the constitution of this state to a lot owner for such damages as he may sustain by filling in the street in front of his lot above the level of the same, when the buildings were erected on the lot before the grade was established.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

G. W. Ambrose, for plaintiff in error.

W. J. Connell, for defendant in error.

17 548
31 645
32 301

17 548
40 74

17 548
45 458

17 548
47 135

17 548
49 668

51 37

51 739

59 42

53 646

MAXWELL, J.

The plaintiff alleges in her petition that she is the owner of the south 107 feet of lot 5 in block 248, in the city of Omaha, which is situate on the north side of Pierce street and between Eighth and Ninth streets, in said city; that she has "two dwelling-houses of five rooms each, and other usual and ordinary improvements, outhouses and the like," on said lot, all of the value of \$1,200; that said houses were erected before the grade of Pierce street was established; that in the year 1878 the defendant established the grade of Pierce street, and in 1883 sought to work said street to the grade, and in doing so "filled in the earth in front of said houses and lot five feet, and compelled the plaintiff to erect a plank barricade in front of said premises in order to keep the earth away from said houses, at a cost of \$100;" that in order to render said residences habitable the plaintiff will be compelled to fill said lot to the level of the street, and has sustained other damages thereby, in all to the amount of \$1,600; that at no time either before or subsequent to said grading has she been allowed or tendered any compensation for said injury, etc. A demurrer to the petition was sustained in the court below and the action dismissed.

The question presented is the right of a lot owner, who has erected buildings thereon before the grade was established, to recover damages for injury sustained by him by raising the street, to his injury, in front of his property. At common law an injury of this kind is not actionable, and such was the rule in this state prior to the adoption of the constitution of 1875. *Nebraska City v. Lampkin*, 6 Neb., 27. Section 21 of the bill of rights of the constitution of 1875 is as follows: "The private property of no person shall be taken or *damaged* for public use without just compensation therefor." The above section, without the words "or damaged," was in our former constitution (Sec. 13, Art.

Harmon v. Omaha.

I., Constitution of 1866). The words "or damaged," therefore, were without doubt added to the section for the purpose of extending a remedy to the owner of the property in all cases where his property has been damaged by the work done. Nor is the right to recover restricted to such injuries as were designated torts at common law. The question is not whether the work was skillfully and carefully performed or not, because if the property of the party has been damaged by the work, however carefully and skillfully performed, he is entitled to compensation for such damages. In other words, the right to recover does not depend upon the skill or care, or the want of it, with which the work was performed, but whether when the work, if carefully and skillfully done, has injuriously affected or damaged the plaintiff's property. If so he is entitled to recover. If the work is unskillfully or carelessly performed, so that additional damages result from that cause, it is probable that a recovery can be had therefor, but that question is not before the court.

In *Reardon v. City of San Francisco*, 6 Pac. R., 325-326, the supreme court of California say: "We cannot say that the convention inserting in the constitution of this state the word "damaged," in the connection in which it is found, and the people in ratifying the work of the convention, intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not, to superadd to the guaranty found in the former constitution of this state and nearly all other states, a guaranty against damage where none previously existed." These remarks are applicable in this state. Our former constitution required compensation to be made for property taken. If, however, no portion of the property of the party injured was taken, and the work was skillfully and carefully done, the owner was

without remedy. In grading a public way a fill might be made five or fifty feet in height in front of his residence, thereby greatly depreciating it in value, and he was without means of redress. So in regard to other injuries which need not be here referred to. To afford relief in such cases the amendment above referred to was made to our present constitution. And the constitution was adopted by the people of the state with this express guaranty to every property owner in the state—that just compensation should be made for his property if taken or damaged for public use. The provision is self-operating and requires no legislation to carry it into effect. It is the law of this state, and should be so construed as to give effect to it.

“In construing remedial statutes there are three points to be considered, viz.: The old law, the mischief, and the remedy. That is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief, and it is the business of judges so to construe the act as to suppress the mischief and advance the remedy.” 1 Blackstone’s Com., 87.

Applying these principles to the provisions under consideration, it is clear that it was intended to supply a defect in the common law, and requires the public—the party benefited—when taking or damaging property for public use, to bear the burden by making just compensation therefor. And this rule applies whether the injury is committed by a railroad company or municipal corporation.

The constitution makes no distinction as to the form of the public use for which compensation is to be made; and the court has no authority to inject words into that instrument exempting municipal corporations. There are many reasons why they should not be excepted. In this state, at least, the damage to property in cities from cuts and fills in grading streets probably affects a greater number of persons and property of greater value than is caused

by all the railroads of the state outside of the cities and villages, for the reason that a railroad does not necessarily pass near residences nor cause damage to farms by cuts and fills, while in a street, like that upon which the plaintiff's buildings are situated, the grading necessarily occasions more or less damage to a large number of the lot owners. The attorney for the city estimated the claims for such damages, in that city at \$150,000; but whatever the sum, it is evidently more just and equitable to apportion it on the property of the 60,000 or more people of the city, than upon the 50 or 500, as the case may be, lot owners who have sustained the damage. *Reardon v. San Francisco*, 6 Pac. Rep., 317. *Rigney v. Chicago*, 102 Ill., 64. *Johnson v. Parkersburg*, 16 West Virginia, 402. *Atlanta v. Green*, 67 Ga., 386. *Worth v. Springfield*, 78 Mo., 107. *McElroy v. Kansas City*, 21 Fed. Rep., 257. *Gottschalk v. C. B. & Q. R'y Co.*, 14 Neb., 550. An elaborate opinion of the able judge before whom the case was tried is printed in the brief of the city attorney. It contains a full review of the common law cases; and without a provision such as is contained in our constitution undoubtedly states the law correctly. That provision, however, has provided a new remedy to the owners of property damaged, which he has not discussed as fully as could be desired. Upon the whole case, we are of the opinion that the petition states a cause of action, and that the court erred in sustaining a demurrer to it. The question of the measure of damages does not arise in the case, and will not be discussed. The judgment of the court below is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. HENRY UPTON, WOODS CONES, WILSON HALL, RICHARD R. SMITH, WILLIAM H. McDONALD, AND C. C. WILSON, v. EDWARD P. WEATHERBY, HERMAN R. MEWIS, AND H. S. BECK, RESPONDENTS.

1. **School Officers: COMMENCEMENT OF TERMS.** Under the provisions of section one of subdivision six of the school law, as amended in 1885, when a school district elects six trustees to act as the officers of the district in lieu of the board of three, the official terms of the old board expire on the second Monday of July following. Until that time the trustees elect are not the proper officers of the district.
2. ———: **ACCEPTING OFFICE.** In such case, where the new board meet within ten days after the election and elect one of their own number as director, and each file written acceptances of office with him, under the belief that he is the proper custodian thereof, the mistake made in the selection of the custodian of the acceptances will not destroy the right of the trustees to the office after the expiration of the official terms of their predecessors. But such custodian should at once deposit the acceptances with the director then in office, in order that they might be preserved with the records of the district.

ORIGINAL action in *quo warranto*.

Brome & Durland, for relators.

E. P. Holmes, for respondents.

REESE, J.

The electors of school district number two of Pierce county elected six trustees at the annual meeting in April, 1885, as district officers, instead of retaining a board of three as formerly. This action was had under the provisions of section one of subdivision six of the school law, as amended by the act of 1885. Laws 1885, Ch. 79. Comp. Stat., Ch. 79. On the 11th day of April, and

within ten days after the election, the six trustees met within the district, and from their own number elected a director, moderator, and a treasurer. Thereupon each of the trustees filed with the director thus elected their written acceptance of the office of trustee to which he had been elected by the annual meeting. The old district board refused to surrender to them their respective offices, claiming that under the provisions of the amendment of 1885 their official terms did not expire until the second Monday in July. It being of importance to the district that the proper officers should act, the question of their right to hold over is submitted to this court for determination by a proceeding in the nature of *quo warranto*.

On the part of the relators it is insisted that the corporation district has undergone a complete change by the action of the annual meeting, and that the old corporation has virtually terminated and a new one has been created, and that, of necessity, all official terms have expired. The official terms of the officers doubtless have or will expire with the end of the school year, but we do not agree with counsel that the corporation has of itself terminated, or undergone any very material change. True, the powers of the board of trustees may be somewhat greater than the powers of the three directors would have been, but the district, with all its rights and powers, will remain the same as before; the only difference being a change in the manner of transacting its business and in the method of government. The question then is, who are now the proper officials of the district, with power to bind it by contract and transact its business?

By the law of 1885, which took effect upon its approval, section one of subdivision two was amended so as to read as follows: "The annual school meeting of each school district shall be held at the school-house, if there be one, or at some other suitable place within the district, on the first Monday of April of each year. The officers elected as hereinafter provided shall take possession of the office to

which they have been elected upon the second Monday of July, and the school year shall commence with that day ; *Provided*, That all school officers whose term of office would otherwise expire upon the first Monday of April, shall have their term of office extended until the second Monday of July following." Laws 1885, Ch. 79. Comp. Stat., Ch. 79. By this section, the "school year" is changed so as to commence and terminate on the second Monday in July, instead of April, and the date of the termination of the terms of the officers of the district is changed so as to correspond with the termination of the school year.

By the amendment of section one of subdivision six, that section reads as follows: "Any district containing more than one hundred and fifty children between the ages of five and twenty-one years may elect a district board, consisting of six trustees; *Provided*, The district shall so determine at an annual meeting by a vote of the majority of the voters attending such meeting. When such change in the district board shall have been voted, the voters at such annual meeting shall proceed immediately to elect two trustees for the term of one year, two for the term of two years, and two for the term of three years, and annually thereafter two trustees shall be elected, whose term of office shall be three years and until their successors shall have been elected and filed their acceptance; *Provided further*, That all officers whose term of office would otherwise expire upon the first Monday in April shall continue to exercise the duties of their office until the second Monday in July." Comp. Stat., Ch. 79.

The second proviso of this section appears to meet and settle the case at bar. There is no legal reason why the necessary duties of the district officers cannot be as well performed by the board of three as by a board of six during the time intervening between the annual meeting in April and the commencement of the next school year in July. Hence the express provisions of the statute requir-

ing them to do so cannot be treated as inoperative. The election of trustees being valid, the terms of office of all the members of the old board would expire at that time were it not for the change in the date of the commencement of the school year and of the official terms of the officers. The language of the section making this particular change is, "That *all* officers whose terms of office would otherwise expire upon the first Monday in April shall continue to exercise the duties of their office until the second Monday in July."

Upon the part of the respondents it is insisted that, as the trustees have not filed their acceptance in writing with the director of the old board, instead of the director elected by the new one, as required by section three of subdivision three of the school law, they have forfeited all right to the offices of trustees, and cannot now claim the office, even after the second Monday in July.

This position, we think, is not tenable. There seems to have been an honest effort on the part of the trustees elect to qualify in accordance with the letter as well as with the spirit of the law. No official oath is required. They have executed their written acceptances of the offices. By a mistake of law, they have filed these acceptances with the wrong person. Whether the assumption of the duties of the office—thereby accepting the trust—would be sufficient as an acceptance, it is not necessary now to decide. But it seems clear that the action of the annual meeting should not be entirely nullified by the fact of these acceptances being honestly placed in the hands of the wrong custodian.

It is the duty of Henry Upton, the present custodian of these acceptances, to file them with Edward P. Weatherby, the present director, and by whom they should be preserved with the records of the district. On the second Monday of July the official terms of the present board will expire, and the duties of the office of trustees will then devolve upon the trustees elect.

Hartman v. Streitz.

The judgment of ouster is denied, and the relation dismissed.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17 557
34 278

JOHN G. HARTMAN ET AL., PLAINTIFFS IN ERROR, V.
FERDINAND STREITZ, DEFENDANT IN ERROR.

Specific Performance: TRUSTS. In 1865 and 1867 the Homestead Society of Dubuque, Iowa, purchased a tract of land adjoining the city of Omaha, and divided the same into lots known as Hartman's addition to Omaha, the title being in J. G. Hartman, as trustee for the members of the society. One B. rendered valuable services as secretary for said society, and in 1867 or 1868 was given lot 32 in said addition as compensation therefor. He took possession of said lot in 1868 and enclosed the same, and retained possession till his death. In 1869 B. died, leaving a will in which he devised said lot to his widow. The will was duly admitted to probate, and afterwards the widow sold and conveyed all her right, title, and interest in said lot to one S., who brought an action against the trustee and his son, who had notice of the transaction before purchasing, to obtain a deed for said lot. *Held*, That S. was entitled to a specific execution of the contract.

ERROR to the district court for Douglas county. Tried below before NEVILLE, J.

Congdon, Clarkson & Hunt, for plaintiffs in error.

E. W. Simeral and *Geo. W. Doane*, for defendant in error.

MAXWELL, J.

This action was brought by Streitz against the Hartmans to obtain a deed to lot 32 in Hartman's addition to Omaha. It is

alleged in the petition, in substance, that in January, 1865, and in December, 1867, John I. Redick conveyed to John George Hartman the south-east quarter of the north-west quarter of section 27, in township 15 north, range 13 east, except $1\frac{8}{10}$ acres in the north-west corner thereof, etc.; that said land was conveyed to said Hartman in trust for the members of the Homestead Society of Dubuque, Iowa, and was divided into eighty-four lots and became an addition to Omaha, and it was the duty of said trustee to convey to each member of the society his proportionate share of said lots; that one William Baumer was a member of said society and for some years after its formation secretary thereof, and that in consideration of said services so rendered by said Baumer said society covenanted and agreed with him to convey lot 32 in Hartman's addition to him, and requested said Hartman to execute a deed to Baumer for said lot; that said Hartman failed to execute said deed; that in 1869 Baumer died, leaving a last will and testament in which Nanette Baumer was named as sole devisee, which will was thereafter duly admitted to probate in the county court of Douglas county; that on or about the 10th day of June, 1872, John George Hartman conveyed said lot to his son Christian Hartman, who took it with full knowledge of the rights of Nanette Baumer, the widow of said John Baumer, in said property; that in 1880 Nanette Baumer conveyed all her right, title, and interest in the premises to the defendant in error; that in 1868 Baumer took possession of said lot and fenced and improved the same, and that the devisee and her grantee have been in the notorious exclusive possession thereof for more than twelve years before the commencement of the action. There are other allegations to which it is unnecessary to refer.

The defendants below (plaintiffs in error), in their answer, allege: 1st. That John George Hartman selected said lot 32 as a portion of those he was entitled to as a shareholder in said society; 2d. Plead actual and undisturbed possession for

ten years; 3d. That the action is barred; and, 4th. That the contract is void by the statute of frauds. The court below found the issues in favor of Streitz and entered a decree in his favor. The principal error relied upon in this court is, that the judgment is against the weight of evidence.

There is a direct conflict in the evidence; but in our view a clear preponderance of it sustains the following propositions:

First. That William Baumer was secretary of the Homestead Society for a number of years after its organization, and rendered the society valuable services, for which lot 32 was given to him.

Second. That he took possession of the lot in 1868 and enclosed the same and retained possession until his death, and, so far as appears, his devisee and her grantee (the defendant in error) have retained the possession till now.

Third. That in May, 1870, C. Hartman signed a request and direction to "George Hartman, trustee, * * to execute and deliver a full covenant warranty deed of said lot (32) and block to Nanette Baumer, who is sole executrix of the last will of William Baumer, and the only devisee or heir to his estate." The reason given in said petition is, that "Colonel William Baumer, during his life-time a member of said society, was at the time of his death entitled to a full covenant deed to and of lot 32 of block ... in Hartman's addition to the city of Omaha." This paper is signed by twenty-one members of the Homestead Society, who were the owners of nearly one-half of the eighty-four lots, and it is important as showing that the members of the society, or a very considerable number of them, recognized their obligations to Mr. Baumer and were desirous of fulfilling the contract on their part, and that Christian Hartman knew of and recognized these obligations of the society. He, therefore, is not a *bona fide* purchaser of the lot in question. There are many charges of fraud, to which we do

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not deem it necessary to refer, nor will it subserve any good purpose to review the evidence at length. It is evident that justice has been done, and the decree of the court below must be affirmed.

DECREE AFFIRMED.

THE other judges concur.

17	560
23	263
17	560
29	278
17	560
39	176
17	560
45	711
17	560
54	437
54	455
17	560
57	613

L. E. DUNN ET AL., PLAINTIFFS IN ERROR, V. JOSEPH
A. HAINES ET AL., DEFENDANTS IN ERROR.

1. **Jurisdiction.** To give the court jurisdiction in an action against a defendant who resides in and was served with summons in another county than that in which the suit is brought, the defendant who resides in or is served with summons in the county where the action is brought must have a real and substantial interest in the subject of the action adverse to the plaintiff; hence if a surety is discharged by the creditor extending the time of payment without his consent, he is not a necessary or proper defendant.

2. ———: **RESIDENCE: APPEAL: APPEARANCE.** A defendant who resides in a different county from that in which the action is brought, and denies the jurisdiction of the court over his person, should have the ruling of the court on his objections thereto reviewed on error and not by appeal. By appealing he enters a general appearance. *Pearson v. Kas. Manfg. Co.*, 14 Neb., 211.

ERROR to the district court for Douglas county. Tried below before WAKELEY, J.

T. M. Marquett, for plaintiffs in error.

Groff & Montgomery, for defendants in error.

MAXWELL, J.

This action was brought in the county court of Douglas county upon a promissory note, of which the following is a copy:

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"LINCOLN, NEB., Jan. 29, 1881.

"Ninety days after date, for value received, we promise to pay to the order of Haines Bros. & Co. four hundred dollars at Omaha,—maturity until paid.

"L. E. DUNN,

"W. H. H. DUNN,

"T. M. MARQUETT."

Service was had upon Mr. Marquett in Douglas county, and upon the other defendants in Lancaster county. Marquett filed an answer to the petition, wherein he alleged that he was merely surety on the note and the other defendants principals, and that the time of payment of said note had been extended "from April 29th, 1881, till June 1st, 1881, without the consent and knowledge of the said defendant, T. M. Marquett." The other defendants demurred to the petition for want of jurisdiction in the court, and the demurrer being overruled filed an answer wherein they allege that they, at the time of the execution of the note in question and when the action was brought, were residents of Lancaster county, and that service of summons was made upon them in that county. On the trial of the cause the court found that Marquett was merely a surety on said note, and that the plaintiffs below had extended the time of payment of the same without his knowledge or consent, and dismissed the action as to him, but rendered judgment against the other defendants for the sum of \$428 and costs. The Dunns then appealed to the district court, where they set up substantially the same facts as in the county court. No appeal was taken from the judgment discharging Marquett. The questions presented, therefore, are: 1st. Was the summons properly served upon L. E. and W. H. H. Dunn in Lancaster county? 2d. Have they entered an appearance by appealing from the county to the district court? Sections 51, 52, 53, 54, 55, 56, 57, 58, and 59 of the code designate the county where the actions named therein shall be brought. Section 60 provides that "every

other action must be brought in the county in which the defendant or some the defendants reside, or may be summoned." This question was very fully considered in *Allen v. Miller*, 11 O. S., 374, where a firm residing in Cuyahoga county assigned to one Allen an account claimed to be due to it from one Miller, who resided in Hamilton county. Miller answered the petition, not only to the merits, but denying the jurisdiction of the court. It was held that the action was properly dismissed for want of jurisdiction. It is said (page 378): "It seems to us that the words 'defendant' and 'defendants,' as employed in those sections of the code to which reference has been made, in so far as they affect the question of jurisdiction, must be held to mean not nominal defendants merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought; and to hold otherwise would open a wide door to all sorts of colorable devices to defeat the policy of the law in respect to jurisdiction—devices difficult to detect but oppressive and wrongful in their practicable operation." The policy of the law is, that a personal action is to be brought against a defendant—one having an interest adverse to the plaintiff—in the county where such defendant resides or may be served with summons. Certain exceptions are made in the code, § 363, as to witnesses served with summons while attending court in a county different from that in which they reside, which need not be noticed here. But a plaintiff cannot, by joining one whom he alleges is a defendant with others in another county, and take judgment against all, if the proper objections are made, unless the party served in the county where the action is brought is an actual defendant—one having an actual interest in the result of the suit adverse to the plaintiff. Therefore, where defendants reside in different counties the plaintiff must commence his action in a county where an actual defendant in that action resides or may be served with summons. *Pearson v. Kas. Manufg. Co.*, 14 Neb., 211.

A surety who has been discharged by an act of the plaintiff from liability on the instrument sued on is neither a necessary nor proper party defendant; as where the creditor without the consent of the surety extends the time of payment. In such case the creditor enters into a new contract with the principal debtors, by which he as effectually discharges the surety from liability as if the debt had been paid. Not being liable he could not properly be made a defendant, and the fact that he was joined with the principal debtors did not authorize the plaintiffs below to bring their action in Douglas county. The county court, therefore, should have dismissed the action.

Where it is claimed that the county court has erred by assuming jurisdiction over the person of a defendant in an action pending in that court, the proper mode of reviewing the question of jurisdiction, or the want of it, is by petition in error to the district court. In the court of original jurisdiction a defendant may join all his defenses in one answer. That is, he may plead want of jurisdiction and to the merits, because if any one of his defenses is good and sufficient, it will defeat a recovery, and the code authorizes him to plead any defense, counter-claim, or set-off he may have. As he relies upon the want of jurisdiction over his person, that question is in issue, and if the ruling is against him he may have it reviewed on error. If, however, waiving this right, he appears generally in the action, as by filing an appeal bond, he will waive the want of jurisdiction, because he thereby admits by his obligation that there is a valid judgment against him. This question was before the court in *Pearson v. Kansas Manfg. Co.*, 14 Neb., 211, and it was held that an appeal from a judgment in a personal action gives the appellate court jurisdiction of the appellant, regardless of whether the lower court had acquired jurisdiction over him or not. In that case it is said (page 213): "It is very clear that the district court, whose judgment alone we are now dealing with, had jurisdiction

State v. Matley.

over Pearson and was given it by his own voluntary act—that of appeal.” *Shawang v. Love*, 15 Neb., 142. As the plaintiff in error, by taking an appeal to the district court, entered a personal appearance in the action, the errors complained of are waived. The judgment must therefore be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	564
34	638
17	564
46	623
46	673

STATE OF NEBRASKA, EX REL. ALFRED A. GRABER, V.
HENRY W. MATLEY ET AL.

1. **Mandamus: INTERVENTION BY CITIZENS.** An alternative writ of mandamus was issued to compel the county clerk and board of canvassers of G. county to re-assemble and canvass the votes of said county for county seat. The board at once proceeded to canvass the votes as commanded in the writ, and made due return thereof. On the return day certain citizens of that county asked leave to intervene, upon the grounds of collusion and fraud between the relator and defendants. Leave was granted.
2. ———: **CANCELING WRIT AFTER ISSUANCE.** The court, during the term at which it is issued, may, for sufficient cause, cancel an alternative writ of mandamus and all proceedings thereunder, where it is made to appear that the writ should not have been issued.

MANDAMUS. Application to intervene and cancel writ.

A. M. Robbins and *Williams & Jenckes*, for intervenors.

Thurston & Hall and *E. M. Coffin*, for relator.

MAXWELL, J.

In the month of January, 1885, an election was held in Garfield county to determine the permanent location of the

county seat of that county. At that time the county was divided into six precincts, named as follows: "Rockford, Willow Springs, Calamus, Dry Cedar, Midvale, and Erina." The towns of Burwell and Willow Springs were the contestants for the county seat. On the 5th day of last February, the defendant Matley called to his assistance the defendants Davis and Brownell as a board of canvassers to canvass the returns of said election. They found that Willow Springs had a majority of seven votes, and it was thereupon declared the county seat. Afterwards the relator applied to this court for a mandamus to compel the board of canvassers to re-assemble and canvass said votes. He alleged in his application that Dry Cedar precinct gave a majority of 15 votes for Willow Springs according to the returns as canvassed: "That no poll book was returned from said precinct of Dry Cedar, nor were any lists returned from said precinct, nor were any ballots, nor was there any evidence of the number of votes which had been cast in said Dry Cedar precinct produced before said board of canvassers. But affiant (the relator) says that certain interested parties produced to said board a certain paper purporting to show what had been done in said Dry Cedar precinct, said paper being a private paper, and without any authentication of any sort whatever. The parties producing said paper stated that it had been handed to them, and while they would not swear to its being a true statement of what the poll book showed, yet they claimed it to be such; that said paper was afterwards taken away by the person who produced it, and cannot now be procured; that said paper, which was so canvassed, was not signed by anybody, nor certified to by any person, nor did it purport to be so signed or certified, nor did it purport to be authenticated in any manner whatever," etc. It is also alleged that this paper was presented to the canvassing board on the sixth day after the election, "and that said board of canvassers proceeded to

canvass said paper, and receive it as showing the votes cast in Dry Cedar precinct, and to count said list as a part of said canvass," etc. The attorney for the relator merely asked for an order on the defendants to show cause; the court, however, supposing that the affidavit stated all the facts in relation to the canvass of the votes, granted an alternative writ returnable on the 28th of April last. To the writ thus issued the defendants made return, in substance, that on the 18th day of April, 1885, they received the writ, and in pursuance of its commands they, on the same day, did re-assemble and canvass the votes of Garfield county by excluding the returns from Dry Cedar precinct, thereby giving Burwell a majority of all the votes canvassed. At the return day of the writ, certain citizens of Garfield county made application to intervene in the case, and supported the same with affidavits charging the relator and defendants with collusion in the mandamus proceedings; that the returns from Dry Cedar precinct had been duly made as required by law to Matley, the county clerk, but that on the night preceding the canvass of the votes said returns were stolen from his possession, and that a copy of said returns was thereupon procured from the judge of election having charge of the same, which was the alleged private paper referred to in said writ. It was also alleged that the relator and one Nelson were interested in a contest of election then pending in favor of the candidate, Burwell, which was pending at the time the application for the mandamus was made, and had not yet proceeded to judgment; and the relator had an adequate remedy at law. An order to show cause why the proceedings in mandamus should not be set aside was then made, and a return made to the order, and affidavits filed, which are conflicting upon many points, but substantially agree upon the facts as above stated, which are all that we deem material.

The first question presented is the right to intervene. The rule is well settled that in matters of mere public

right the people are the real party in interest, and in such cases the wrongful refusal of officers to act is no more the concern of one citizen than another. *People v. Collins*, 19 Wend., 56. *County of Pike v. The State*, 11 Ill., 202. *Rex v. Commissioners*, 1 Term R., 146. Moses on Mandamus, 197-8. In such cases it is sufficient for the relator to show that he is a citizen, and as such is interested in the execution of the laws. *State v. Stearns*, 11 Neb., 104. *State v. Peacock*, 15 Id., 442. *Hall v. The People*, 57 Ill., 818. *State v. Judge*, 7 Iowa, 202. *Hamilton v. The State*, 3 Ind., 458. *The People v. Halsey*, 37 N. Y., 348. *State v. Shropshire*, 4 Neb., 413. And if any citizen may initiate proceedings to secure the enforcement of the laws where the decision upon the relation might affect every citizen in the county, any other citizen certainly has the right to show to the court any fact which would defeat the action. This would have been so had an order to show cause been made instead of issuing an alternative writ, and the fact that the writ was issued does not prevent the court from receiving such an application showing that the writ was issued under a mistaken statement of facts. We therefore hold that the application to intervene was properly made.

Second, It is competent for a court granting even a peremptory writ of mandamus to set it aside if it was obtained by fraud, false representations, or concealment of material facts on the part of the relator. *Everett v. The People*, 1 Caines' Report, 8. *Everett v. People*, Coleman & Caines' Cases, 149. The rule is well settled that a judgment obtained through fraud, accident, or mistake will, in a proper case, be set aside. *Truly v. Wanzer*, 5 How., 141. *David v. Tillston*, 6 Id., 114. *Hendrickson v. Hinokley*, 17 Id., 443. *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. *Ocean Ins. Co. v. Fields*, 2 Story, 59. *Robinson v. Wheeler*, 51 N. H., 384. *Wingate v. Haywood*, 40 Id., 437. *Emerson v. Udall*, 13 Vt., 477. *Gainty v. Russell*, 40 Conn.,

450. *Dobson v. Pearce*, 12 N. Y., 156. *Munn v. Worrall*, 16 Barb., 221. *Foster v. Wood*, 6 Johns. Ch., 87. *Tompkins v. Tompkins*, 3 Stockt., 512. *Wistar v. MoManes*, 54 Penn. St., 318. *Webster v. Skipwith*, 26 Miss., 841. *Humphries v. Bartee*, 10 S. & M., 282. *Pelham v. Moreland*, 11 Ark., 442. *Nelson v. Rockwell*, 14 Ill., 875. *How v. Mortell*, 28 Id., 479. *New Orleans v. Morris*, 8 Woods, 103. *Smith v. McLain*, 11 W. Va., 654. *Shields v. McClung*, 6 Id., 79. *Crim v. Handley*, 4 Otto, 652. *Pomeroy's Eq.*, § 1364, and cases cited. The power of the court in all such cases is unquestioned. There are charges of fraud upon both sides in this case which we deem it unnecessary to consider, for the reason that the relator failed to state in his application a material fact well known to him, viz., that proceedings were then pending to contest the election. This court has held that the remedy by contest was not exclusive. *State v. Stearns*, 11 Neb., 104. *State v. Peacock*, 15 Id., 442. And there are many cases where it is not an adequate remedy, as where on the face of the returns the relator is entitled to the certificate of election. In such case the court will compel the counting of votes as shown by the returns and the issuing of the certificate to him who has the apparent right, and he will not be compelled to appear as contestant to obtain what the returns show he is entitled to without a contest, viz., the certificate of election. He may contest the election, however, instead of proceeding by mandamus, and may have sufficient cause for doing so, as where illegal votes were cast for his competitor. But whatever the cause, having chosen his remedy he must exhaust that before instituting other proceedings. The whole theory of our civil procedure is to avoid a multiplicity of suits, hence the plea of another action pending between the same parties and for the same cause of action is a good plea in abatement. A proceeding to contest an election is substantially an action, and as it was pending when this proceeding was instituted

that remedy must be exhausted before relief will be granted in this, otherwise it would be possible for a party to serve notice of contest upon the successful party, and after the time for the adverse party to serve notice had elapsed, dismiss the proceedings and rely upon a mandamus. This case is a proper one for a contest. There is no doubt the returns from Dry Cedar precinct were properly made. The election officers of that precinct are not in fault, but through the neglect of some one the returns were taken away. If the votes returned from that precinct were actually cast by legal voters they should be counted, and this court cannot give its sanction to any proceedings that would disfranchise any portion of the community. But it may be said the defendants have already complied with the command of the writ and canvassed the votes of said county, except Dry Cedar precinct, and that the cancellation of the writ will not affect the result as thus declared. That, however, does not follow. The writ is under the complete control of the court during the term at which it was issued, and it may require the return to be amended or the board to perform their duty more fully. The court acts upon the returns through the board of canvassers, and it is its duty to see that justice is done between the parties so far as the nature of the case will admit of. It is evident that the writ was inadvertently issued, and that justice requires its cancellation. In other words, the court made a mistake in issuing the writ and now corrects the wrong by recalling it and canceling all proceedings thereunder. The writ of mandamus heretofore issued, and all proceedings thereunder, including the canvass of the votes by said defendants, are hereby set aside, annulled, and held for naught, and the case will stand upon the application for a mandamus until the conclusion of the proceedings to contest the election.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17	570
19	139
17	570
51	614
53	675
17	570
58	6

BURLINGTON & MISSOURI RAILROAD COMPANY IN NEBRASKA, PLAINTIFF IN ERROR, V. MARTHA CROCKETT, ADMINISTRATRIX, DEFENDANT IN ERROR.

1. **Civil Damages: PLEADING.** In an action by the personal representatives of a deceased person to recover damages for his death, it must be alleged in the petition that the deceased left a widow or next of kin, or both, according to the fact.
2. **Pleadings: AMENDMENT.** An objection made for the first time on the trial of a case that the petition does not state facts sufficient to constitute a cause of action is not to be encouraged, and if the defect complained of can be cured by amendment, the court should permit an amendment to be made instantaneously and let the trial proceed. The want of a material averment, however, where objection is made, is not cured by the verdict.
3. ———: **REVOCATION OF AUTHORITY TO SUE.** Where an administratrix had authority when the action was commenced to bring an action to recover damages for the death of the intestate, a subsequent revocation of the authority must be specially pleaded, and is not put in issue by a denial of her authority "to sue or recover in and maintain this action."
4. **Administration: NEW ADMINISTRATOR: REVIVOR OF ACTION.** Where, from any cause, the powers of an administrator cease, an action commenced by him will not therefore lapse; but upon the appointment of a new administrator the prosecution of the action will proceed.

ERROR to the district court for Lancaster county. Tried below before POUND, J.

Marquett, Deweese & Hall, for plaintiff in error.

A. J. Sawyer, for defendant in error.

MAXWELL, J.

In September, 1883, the defendant in error brought an action against the plaintiff in error to recover damages sustained by the death of one Clayborn Crockett. The peti-

tion, when filed, contained two counts, but on the motion of the defendant below the plaintiff was required to elect upon which count she would rely, and thereupon she selected the second. The second count alleges that on the 7th of March, 1882, the plaintiff below "was duly appointed administratrix of the estate of Clayborn Crockett, deceased, by the probate court within and for the county of Atchison and state of Kansas, and that in pursuance of said appointment she did thereafter, on said 7th day of March, A.D. 1882, qualify as said administratrix." After setting out that the defendant is the owner of and operating a railroad from Lincoln to and through Milford, in Seward county, that the deceased was twenty-four years of age in 1881, it is alleged, "That on the 18th day of November, 1881, said defendant, by its wrongful, careless, and negligent acts of its servants, agents, and employes, caused the death of said Crockett. That said wrongfulness, carelessness, and negligence consisted in this, to-wit, that on said 18th day of November, A.D. 1881, and for some time prior thereto, said Clayborn Crockett was engaged in the employment of said defendant, as foreman of a number of men then in the employment of said defendant, and at work upon a gravel train of said defendant; that it was the duty of said Clayborn Crockett to see that said employes of said defendant tendered themselves promptly for duty at the beginning of each day, and at the beginning of work of each afternoon of each day; that on said 18th day of November, 1881, said Clayborn Crockett was ordered and directed by one John Wyatt, foreman and conductor of said construction and gravel train (and superior to said Clayborn Crockett), to assist the shovelers in filling the cars then being used by defendant with gravel and earth, from a pit located near Milford, in Seward county." It is also alleged that, prior to that time and on that day, it was the custom of said defendant and its agent to keep a person to watch said gravel bank, and, in case of danger, to give warning to those working

in the pit, to protect them from danger; but that when Crockett was required to assist in loading the cars, the watcher was taken off, and in consequence thereof, while said Crockett was engaged in loading the cars, a large quantity of gravel and earth fell from the bank upon Crockett, and so injured him that he died soon afterwards. The defendant in its answer says, "that the plaintiff ought not to recover, and has no legal right or authority to bring and maintain this action." The defendant also says, "that the said Clayborn C. Crockett, deceased, by his own carelessness and negligence, directly contributed to the injury complained of, and that said accident, injury, and death occurred without any fault or negligence on the part of the defendant." On the trial of the cause the defendant objected "to the introduction of any testimony in this case, for the reason that the plaintiff has not set forth a cause of action entitling her to recover. * * * There is no kin alleged—no relationship of kin, in any way, to the party deceased. * * * And, as appears by the petition, the plaintiff has no legal capacity to sue and maintain the action." The plaintiff's attorney then asked leave "to amend the petition by inserting that he (Clayborn Crockett) was the son of the plaintiff, and that it was without fault or carelessness on his part that the accident happened." COURT: "You can allege there that it was without fault, but no amendment as to his being her son."

The practice of objecting on the trial of a cause, after a jury has been impaneled and witnesses called to testify in the case, and a large amount of costs incurred, to the insufficiency of the petition is not to be encouraged, and if delayed until that time the court should, if necessary, and the defect can be cured by amendment, permit an amendment to be made instanter, and, unless for cause the case is continued, require the trial to proceed. A defect which would be fatal to recovery, however, may be taken advantage of at any time. Thus, in the "act authorizing the recovery of dam-

ages by the personal representative of a person whose death is caused by the wrongful act of a person, company, or corporation," which took effect May 1st, 1873, it is provided, "that every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered shall be for the exclusive benefit of the widow and next of kin of such deceased person," etc. Comp. Stat., Ch. 21. There certainly must be an allegation that the deceased left a widow or next of kin, or both, as the case may be, and a petition without such an allegation will not sustain a verdict. It is somewhat remarkable that a trial court would refuse to permit an amendment of the kind asked for. It is probable that the question was not fully presented to it, and that the ruling was made under a misapprehension. But, however this may be, the petition is clearly defective in that regard, and as the proper objections were made on the trial, it cannot be amended in this court.

2d. On the trial of the case the plaintiff introduced in evidence the following stipulation:

"*Crockett v. B. & M.*

"I agree that plff. may have certified copies of appointment of admi'x, that we have to use in proof or we will stipulate as to her appointment.

"J. W. DEWEESE, for def't.

"We admit that Martha Crockett was duly appointed admi'x of estate of Clayborn C. Crockett, deceased.

"J. W. DEWEESE, for def't.

"A. J. SAWYER, for pl'ff."

This is marked, filed March 10th, 1884. The attorney for the defendant offered in evidence an order of the probate court of Atchison county, Kansas, dated November 27th, 1884, revoking the appointment of the plaintiff as executrix. On whose application this order was made does not appear, nor does the record show that any notice was given to the plaintiff. The alleged ground on which the

order is made is, that the plaintiff has removed from the state of Kansas, and has removed to Lancaster county, Nebraska, "with the intention of permanently residing in said county," etc. It is pretty clear that a probate judge ordinarily cannot revoke letters of administration without giving the parties to be affected thereby an opportunity to be heard. Not only the administratrix, but other parties interested in the estate, must have an opportunity to protect their rights before such action can be taken. And an order removing an administrator upon the ground of being a non-resident, without notice in some form, is simply void. But even if the court had authority to make the order, still it would not affect this action. The plaintiff was executrix at the time the action was commenced, as all the testimony shows, and if her appointment was revoked while the action was pending it would not therefore fail. Suppose she had died, the action would not therefore necessarily have been dismissed, but a new administrator would have been appointed and the prosecution of the action continued. The common law adopted the principle that where administration was granted to two or more, and one died, the survivors or survivor became sole administrator. It was not like a letter of attorney to two, where if one died the authority ceased; but it was an office coupled with an interest which survived. 2 P. Wms., 121. Willard on Exrs., etc., 213. Our statute contains the same provisions as to joint administrators as the common law, and provides for the appointment of a new administrator where from any cause a sole administrator is removed. Comp. St., sec. 189, Ch. 23. But the answer does not raise the question of the revocation of the letters. It is alleged that the plaintiff "has no legal capacity to sue or recover damages in and maintain this action." That, however, refers to the commencement of the action. She had authority then, and a denial simply put in issue her authority to bring the action. If since that time her authority has ceased that fact must be

Sutliff v. Johnson.

pleaded affirmatively. *Wilson v. Bothwell*, 50 Ala., 378. If the fact was established the court would not thereupon dismiss the action, but would permit the substitution of a new administrator. If cases could be defeated and dismissed by the simple revocation of letters of administration it would be a reproach upon the administration of justice. But such is not the law. The court did not err, therefore, in sustaining the objections to the order of the county judge of Atchison county. It is unnecessary to review the other questions presented, as there must be a new trial. The judgment of the district court is reversed and the cause remanded to the district court, with directions to permit the plaintiff below to amend her petition, and for further proceedings. Costs to abide the event of the suit.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HARVEY S. SUTLIFF, PLAINTIFF IN ERROR, V. FRED S. JOHNSON ET AL., DEFENDANTS IN ERROR.

1. **Mills and Dams: DAMAGES.** In proceedings in *ad quod damnum* the landowner is entitled to compensation for the land overflowed and rendered useless by reason of the erection of the dam; and for the diminution in value of the residue of the tract by reason of the increased depth of the stream.
2. —: **RIGHTS OF GRANTEE.** A party purchasing a mill and dam across a stream acquires by the purchase no greater right to maintain the dam than was possessed by his grantor; and until the statutory bar is complete will be liable in proceedings in *ad quod damnum* for the value of the land overflowed and appropriated by reason of the erection of the dam. *Ray v. A. & N. E. E. Co.*, 4 Neb., 439.

ERROR to the district court for Seward county. Tried below before POST, J., sitting for NORVAL, J.

17 575
42 328

D. C. McKillip and R. P. Anderson, for plaintiff in error.

R. S. Norval, for defendants in error.

MAXWELL, J.

In 1879 the defendants in error purchased the mill and appurtenances on the Blue river at Milford. At the time the defendants in error purchased the property the dam across the river was raised to eight or eight and one-half feet above the natural flow of the stream. In the fall of 1880 the defendants in error raised the dam to fourteen feet, and in the year 1882 instituted proceedings in *ad quod damnum* for the condemnation of the property overflowed or injured by the backwater. The plaintiff in error at that time was the owner of the S. E. $\frac{1}{4}$, the E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 26, 7, 10, R. 3 east, which was overflowed or affected by the raising of the dam. The plaintiff in error, therefore, was made a defendant in the condemnation proceedings. A jury was impaneled, examined the property damaged, and made a report in conformity to the statute. The defendants below filed answers, and on the trial of the cause in the district court the jury returned a verdict for \$30 in favor of the plaintiff in error for the damages sustained by him. A motion for a new trial having been overruled, judgment was rendered on the verdict.

The only question raised by the pleadings is the amount of damages to which the plaintiff in error is entitled. The testimony tends to show that the water in the river on the plaintiff's land is raised from four to six feet; that in consequence thereof some of the low ground along the river is flooded by the backwater and is of no value; that a considerable quantity of timber was growing along and near the banks of the stream on the plaintiff's land and that a portion of this has been killed and destroyed; that about

forty acres of this land lies west of the river, and prior to the raising of the dam was used as a pasture, and was connected with the main body of the land by two fords, at either of which in an ordinary stage of the river cattle or horses could cross, and at one of them loaded wagons could cross, etc., but that after raising the dam to fourteen feet these fords were destroyed and the land west of the river practically cut off from the other.

The attorneys for Sutliff asked the court to give the following instruction, which was refused:

"The jury are instructed that under the issues made in this case they should consider all past damages sustained by defendant Sutliff to said lands caused by raising said dam beyond eight feet in height, during the ten years immediately before the beginning of this action, if any such past damages to said land have been sustained by him, and you should include the same in your verdict in addition to the difference of market value of the land immediately after the raising the height of said dam, unless you further find from the evidence that said plaintiffs, F. S. Johnson & Co., or their predecessors, by proceedings under the statute, or from the owner of said lands, had obtained the right to so raise the same beyond the height of eight feet." The instruction asked it will be observed directed the jury to give such *damages* as were caused by raising the dam above eight feet at any time within ten years before bringing the action, and *also* the difference in "the market value of the land immediately before and immediately after the raising of the height of said dam." In this form it was calculated to mislead the jury, and therefore was properly refused. The court, however, had given an instruction "that these plaintiffs would not be liable for damages occasioned to defendant's land by backwater from said dam at any time prior to the time they became the owners of said mill, nor for any damages except such as directly follow from acts of the plaintiffs or their agents or employes." This is not

an action for trespass, but to fix the compensation to be paid to certain landowners for damages sustained by them by raising the dam owned by the defendants in error. By purchase they acquired merely the right possessed by their grantors. If such grantors had not acquired the right to raise the water in the bed of the river on the land of the plaintiff either by condemnation or otherwise, and ten years had not elapsed from the time of raising the dam to eight feet, until these proceedings were instituted the plaintiff would be entitled to recover for all the damages sustained by him by reason of the backwater. The reason is, he would not be barred of his right to recover the possession of the land until the statutory bar of ten years was complete.

In *Ray v. A. & N. R. R. Co.*, 4 Neb., 439, a corporation called the Burlington and South Western R. R. Co. located its line over the plaintiff's land, and the award of damages being made, appealed to the district court, where judgment was rendered against the company, but it failed to pay to the county judge the amount of the award or to pay the judgment. The company then assigned all its rights, interests, and franchises to the A. & N. R. R. Co., and it was held that it acquired no greater rights than were possessed by its assignor, and that it would not be permitted to operate the road across the plaintiff's land unless it paid the judgment. The same principle applies in this case. The instruction, therefore, is erroneous. It is evident, too, that the attempt to distinguish the damages occasioned by successively raising the dam tended to confuse the jury and was prejudicial to the plaintiff. The court refused to give the following instruction: "If you find that any part of the land in question has been overflowed by reason of said mill-dam and by reason of said overflow has been rendered useless and of no value to this defendant, H. S. Sutliff, you are instructed that so much of the land so overflowed is regarded in law as appropriated by the plaintiffs, F. S.

 Webster v. Wray.

Johnson & Co., to their sole use and benefit, and the defendant Sutliff is entitled to the market value of said overflowed land in addition to the depreciation of the remainder of his land, and if you find any such overflowed land you should so find the value thereof and consider the same in arriving at your verdict." The testimony shows from one and a half to four or more acres were overflowed by raising the dam. This land certainly was appropriated, and the plaintiff was entitled to compensation therefor. The statute, while giving the party erecting a mill the right to erect a dam across a stream for the purpose of obtaining power to propel the machinery of the mill, yet protects the landowner by requiring compensation to be made to him for his land taken or damaged. He must be paid full compensation for the injury sustained. This means the value of the land appropriated and any damages to the residue of the tract by reason of the increased volume of water caused by the dam. The instruction in question, therefore, should have been given.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

THE other judges concur.

17	579
27	379
17	579
30	588

E. D. WEBSTER, PLAINTIFF IN ERROR, v. J. T. WRAY,
DEFENDANT IN ERROR.

Principal and Agent. A principal is bound by the acts of his agent to the extent of the apparent authority conferred on him.

ERROR to the district court of Hitchcock county. Tried below before GASLIN, J.

Marquett, Dewees & Hall, for plaintiff in error.

J. Byron Jennings, for defendant in error.

MAXWELL, J.

This is an action to recover against E. D. Webster upon certain contracts for the payment of money made by his son, Thomas B. Webster. There are four of these contracts which are set out in the petition, together with an allegation after each one of them, in substance that Thomas B. Webster had full authority to contract said debt, and that it was contracted for the benefit of E. D. Webster. The answer is a general denial. The jury in the court below returned a verdict in favor of Wray and against E. D. and Thomas Webster for \$254.02, upon which judgment was rendered. The ground upon which a recovery is sought against E. D. Webster is, that he had authorized Thomas B. Webster, his son, to contract debts and borrow money in his own name for his father, in connection with the business in which they were engaged. The petition is very long and somewhat diffuse, and on reading it the first time the writer was inclined to adopt the views of the plaintiff in error, that it failed to state a cause of action against E. D. Webster. A more careful reading, however, shows its purpose, and aided by the liberal rules of construction of the code, it is sufficient to sustain a verdict. The testimony tends to show that in the year 1876 E. D. Webster purchased a herd of cattle and placed them on his ranch on the Stinking Water. One witness stated, "It was called Webster's Ranch, the Quarter Circle W Ranch." The ranch and herd were in the care of Thomas B., the son, and the herd was registered in his name, and seems to have been so registered when this action was tried. The son was to have a fifth interest in the profits of the herd, the father apparently to pay all expenses. The son bought

and sold stock with the father's knowledge, and without objection; contracted debts, which the father paid without complaint, and generally did all things necessary in the management and control of the herd. In the spring of 1881 it is claimed that the authority of the son was revoked, but the proof fails to show that any notice of this fact was given, either generally or specially. The only testimony upon that point being that of E. D. Webster, who testifies that, "In April, '81, I sent White out here to look up matters, and see what debts Tom owed, and what the outfit owed. White came in January, '81. I instructed him to look up everything; I kept him here five months. I sent him with instructions to look up everybody with whom Tom had any business on his account, and to notify me so I could pay them, and notify them that from that time Tom had no authority to contract debts or buy cattle, or in any way involve me; and White notified me that he had done so; and at that time I took a bill of sale from Tom as to all his interest in the herd." There is no proof whatever that Mr. Cook or any one else gave notice that the agency of Thomas B. Webster had ceased, if in fact it had ceased, in 1881, as the testimony shows that with the exception of a month's absence in the spring of 1881, when he went south, Thomas B. remained at the ranch, apparently exercising the same authority as before. These debts were contracted by him in reference to matters connected with the business of the agency, and when so contracted, even if some of the money or property thus obtained was misappropriated, the principal will be bound. While the rule is that an agent must act within the scope of his authority, yet when the agent's acts affect innocent third parties the principal will be bound to the extent of the apparent authority conferred by him on his agent. *Van Duzer v. Hawe*, 21 N. Y., 531. *Redlich v. Doll*, 54 Id., 234. *Garrard v. Haddan*, 67 Penn. St., 82, S. C., 5 Am., 412. *Hatch v. Taylor*, 10 N. H., 538. *Carmichael*

Sieber v. Weiden.

v. Buck, 10 Rich, 382. A principal is bound equally by the authority which he actually gives, and by that which by his own act he appears to give. In our view the plaintiff is bound both by the authority he gave his son and by that which by his own acts he appeared to give. It is evident that substantial justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	588
46	351
17	582
50	157

14-215

FRANK SIEBER, PLAINTIFF IN ERROR, V. WENZEL
WEIDEN, DEFENDANT IN ERROR.

1. **Practice: ORDER OF INTRODUCING TESTIMONY.** Upon a trial the testimony should be introduced in the order in which the issues are presented by the pleadings. Where the plaintiff, at the beginning of the trial, and before the defendant had produced any evidence, introduced testimony to sustain the allegations of his reply, and which should have been introduced only for the purpose of rebutting testimony offered to sustain the allegations of defendant's answer, it was *Held*, Not to be error for the trial court, upon motion, to order the testimony stricken out.
2. **Bill of Exceptions: TESTIMONY.** When testimony is offered and excluded, the bill of exceptions must set forth the testimony thus offered and rejected. *McMillan v. Malloy*, 10 Neb., 228.
3. **Evidence, Held,** Not sufficient to show that a settlement and payment of money was obtained by duress.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

Samuel J. Tuttle, C. H. Bane, and L. W. Billingsley,
for plaintiff in error.

John P. Maule, for defendant in error.

REESE, J.

The plaintiff in error instituted this action in the court below for the purpose of recovering back the sum of \$500 alleged to have been obtained from him fraudulently, and by duress, by defendant in error. The trial in the district court resulted in a verdict and judgment in favor of the defendant in the action. Plaintiff prosecutes error in this court. The answer of defendant contains a general denial, and a further defense that the money was paid by plaintiff in error for and on account of damages sustained by defendant for the seduction of and criminal conversation with the wife of defendant. The reply alleges that the damages claimed for the alleged criminal conversation had been fully paid prior to the payment of the \$500, which plaintiff claimed was paid by duress. The errors assigned by plaintiff will be noticed in their order.

First. The first testimony introduced by the plaintiff in error was a detail at considerable length of a series of conversations between himself and defendant which he claimed resulted in a settlement between them and the payment of \$200 to defendant's wife. After this testimony was given, defendant moved to strike it out for the reason that it was not responsive to the pleadings in the case, and was irrelevant and immaterial. This motion was sustained, and the ruling of the court is assigned as error. It seems pretty clear to us that this action of the court was correct. The facts testified to by the plaintiff were the same as those set up in his reply. It would have been soon enough for him to have testified to the settlement and payment upon proof of the facts alleged in the defendant's answer, as the facts pleaded by the reply could have no other effect than that of explaining, rebutting, or avoiding those set up in the answer. The order of proceedings upon trial seems to be well defined by section 283 of the civil code, which is in accord with the view taken by the trial court.

Second. It is next insisted that the court erred in sustaining the objections of the defendant to certain questions propounded to the witnesses of plaintiff upon their examination-in-chief. It is sufficient to say of all the assignments of this character in this record that no statement or offer of any evidence or testimony was tendered to the court. As said in *McMillan v. Malloy*, 10 Neb., 235: "It is not sufficient to be available on error that the court sustains an objection to a question; the party must offer to prove certain facts, and if they are excluded embody the testimony thus offered in the bill of exceptions." See also *Stanton County v. Canfield*, Id., 388. *Fosbinder v. Svitak*, 16 Id., 502.

Third. Objection is made to the second instruction given to the jury by the court. It is as follows: "The rule in this class of cases is that where a payment of money is made upon an illegal or unjust demand, when the party is advised of all the facts, can only be considered involuntary when it is made to procure the release of the person or property of the party from detention, or when the other party is armed with apparent authority to seize upon either, and the payment is made to prevent it. But where the person making the payment can only be reached by a proceeding at law he is bound to make his defense in the first instance, and he cannot postpone the litigation by paying the demand in silence and afterwards suing to recover it back." This instruction is excepted to and is assigned for error. The criticism upon this instruction is, that in the former part of it the court seems "to eliminate this case from cases where money is obtained by duress, and in so doing misstates the law."

In *Mundy v. Whittemore*, 15 Neb., 647, Judge MAXWELL, in writing the opinion, says: "The common law divided duress into two classes, viz., duress *per minas*, and duress of imprisonment. Duress *per minas* is restricted to fear of loss of life, or mayhem, or loss of limb; in other

words, remediless harm to the person. Duress by imprisonment is supported by any evidence that the party was unlawfully restrained of his liberty until he would execute the instrument" or other thing required.

In *King v. Williams*, 21 N. W. Rep., 502, the supreme court of Iowa, in a recent case, by Judge Seevers, who wrote the opinion, defined duress to be "an actual or threatened violence or restraint of a man's person contrary to law to compel him to enter into a contract or to discharge one." Again it is said that "duress by threat is where the threat excites a fear of some grievous wrong, as of death, great bodily injury, or unlawful imprisonment." Maxwell's Pleading and Practice (3d edition), 104. There is no claim that plaintiff in error was imprisoned. It then becomes necessary to enquire whether the testimony shows any duress by threats. If not, even though the instruction may have been defective, yet it would be without any prejudice to the rights of plaintiff.

From the testimony of plaintiff himself it is apparent that he had been guilty of the crime with which he was charged, and that unless the payment of the \$200 to the wife of defendant was a full settlement of the injury he had inflicted, he was liable to a civil action by defendant. He was also liable to be prosecuted criminally, although there is no proof of any threats on the part of defendant to institute a criminal prosecution. It is further shown that defendant placed his claim for damages in the hands of an attorney for collection, and ordered suit brought. The attorney called upon plaintiff and had a conversation with him. The exact purport of this conversation is not very clear. Afterwards, by agreement, plaintiff went to the office of the attorney, where plaintiff and defendant and the attorney were together. The demand was reduced to \$500, after plaintiff had said he could not raise the \$1,000. The plaintiff testified that he told the attorney he did not have any money, and did not know how to raise it, and the

Sleber v. Weiden.

attorney said he would better settle it than to go to the penitentiary. The attorney left the office, plaintiff and defendant remaining. During the negotiations plaintiff and defendant, at the suggestion of defendant, went to a saloon together and took a drink. Defendant seeing that plaintiff was ill at ease, as plaintiff testified, "he seen it on me that it was not very right, and he said I should not be afraid about this, what they have got together, that he would make it easy, and I went with him to the saloon, and he treated me, and we went back to the attorney's office." The only suggestion of a criminal prosecution was the remark made by the attorney, if plaintiff testified truthfully. The attorney on the witness stand denied making the remark. From the whole case it is clear that plaintiff desired that his wife should not hear of his crime, or at least of an action being brought against him, and for that purpose and under a written pledge of secrecy from the defendant, he paid over the money. He was at perfect liberty to go and come as he might choose. He had ample time and opportunity to consult an attorney if he had so desired. This settlement was made at Geneva, the county seat. This was not duress, and the court would have been justified in so instructing the jury. *King v. Williams, supra*. This applies with equal force to the instructions asked by plaintiff and refused by the court, and no further reference need be made to them.

While the trial was not as satisfactory as perhaps it might have been, yet we can see nothing in the record which will warrant its reversal. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**THE OMAHA, NIOBRARA AND BLACK HILLS RAILROAD
COMPANY, PLAINTIFF IN ERROR, v. LEANDER GER-
RARD AND MICHAEL WHITMOYER, DEFENDANTS IN
ERROR.**

17	587
26	368
17	587
36	368

Eminent Domain: DAMAGES: TITLE TO PROPERTY. A and B were in possession of real estate having a title of record thereto. The R. R. Co. desiring to construct its road over the real estate applied to them for a grant of the right of way, which was refused. It then applied to the county judge for the appointment of commissioners to assess the damage to the real estate by reason of the appropriation of the necessary right of way, alleging A and B as the owners, and their refusal to make the grant. It was then agreed between the R. R. Co. and A and B that the land might be taken and occupied in the construction of the road, and the damages settled by a commission to be thereafter appointed. The commission was subsequently appointed and the damages assessed, from which the R. R. Co. appealed. No other person was made a party to the proceedings in the district court, and no other person claimed any interest in the land nor demanded the damages. *Held*, That the R. R. Co. could not dispute the ownership of A and B, nor their right to the damages assessed by the commissioners.

ERROR to the district court for Platte county. Tried below before NORVAL, J., sitting for POST, J.

A. J. Poppleton and J. M. Thurston, for plaintiff in error.

W. H. Munger, for defendants in error.

REESE, J.

In the year 1866 Thomas C. Durant, the owner of certain lands near the town of Columbus, caused them to be surveyed and platted into lots and blocks, the plat of which was filed as the Capital addition to the town of Columbus. The lands included in the survey and plat

were the north-east quarter of the south-east quarter and the south-west quarter of the north-east quarter of section twenty-four, in township seventeen north, range one west. In the year 1877 the defendants in error purchased a part of the land so platted, for the taxes due thereon. The part so purchased consisted of the platted portion which constituted the north-east quarter of the south-east quarter of said section twenty-four. On the 26th day of April, 1879, the county treasurer executed and delivered to them a tax deed for the lots so purchased. In February, 1881, the defendants in error being the owners under their tax deed of all the lots and blocks within the forty-acre tract, caused the streets and alleys therein to be vacated. On the 30th day of April, 1881, plaintiff being desirous of constructing its railroad over the land, filed with the county judge of Platte county its application for the appointment of six competent persons to inspect the real estate sought to be appropriated for its right of way, and assess the damages to the owners. In this application no mention is made of any lots or blocks, but the land is described as the north-east quarter of the south-east quarter of section twenty-four, etc.; neither is any reference made to Thomas C. Durant as having any interest in the property sought to be condemned. On the same day (April 30, 1881) the plaintiff in error and defendants in error entered into an agreement by which defendants in error were to allow the construction of the railroad across the forty acres of land (described as such) and that the question of damages for the right of way across the same should be settled by a commission to be appointed in accordance with law. The plaintiff in error then took possession of the land and began the construction of its road. On the eighth day of the following June a commission was issued by the county judge to six freeholders of the county requiring them to assess the damage to the property taken.

In the notice of this application given to the landowners,

the land in question is described as the north-east quarter of the south-east quarter of section twenty-four, etc., and as the property of defendants in error—the name of Durant not being mentioned, except in a general way, with reference to any interest he might own in a part of the real estate described in the notice. The return of the appraiser was filed June 11th, 1881, by which the damage found due defendants in error was assessed at \$1,050. From this assessment plaintiff in error appealed to the district court. The trial in that court resulted in favor of plaintiff in error. The defendants in error then removed the cause into the supreme court, by proceedings in error, where the decision of the district court in excluding the tax deed of defendants in error was reversed and a new trial granted. In the report of the case (14 Neb., 270) it is held that the plaintiff in error could not, on appeal to the district court, disprove the title of defendants in error without pleading their want of title. Before a re-trial in the district court, the plaintiff in error filed an answer, alleging that defendants in error were not the owners, and were not at the time the same was condemned and appropriated, and that they had no right, title, or interest in or to the same, except that prior to the date of the condemnation they had purchased the land with others, constituting the forty acres (of which the land condemned was a part), at tax sale of the treasurer of Platte-county, and, in addition to said purchase, had paid certain taxes levied and assessed against the land. That plaintiff in error had no knowledge of the amount of taxes so paid. That the tax sale was void, and did not convey any title in or to the land to defendants in error. That they had a lien upon the land for the taxes so paid, and that the lien constituted the only right, title, ownership, or claim of defendants in error, and that the same would not exceed the sum of fifty dollars, which plaintiff in error was willing to pay. There is no suggestion or allegation in the answer of any facts

which would render the title of defendants in error bad or the sale to them void. A reply was filed which was in the nature of a demurrer, denying the right of plaintiff in error to question defendant's title at that stage of the proceedings, and also denying the allegation that they were not the owners.

Upon a re-trial, a jury being waived, the cause was tried to the court upon an agreed statement of facts, in connection with certain exhibits attached thereto. The stipulation contains substantially the facts stated above, with the additional facts that the value of the land taken was \$1,051; also the amount of taxes paid by defendants in error. That one-fifth part of all the taxes paid were a lien on the land taken by plaintiff in error; and in case defendants in error did not recover as owners, they should have one-fifth part of the taxes paid, and legal interest thereon. That defendants in error have been in the exclusive possession of the land since the date of the tax deed, excepting the possession of plaintiffs in error of their right of way. This statement of facts was agreed upon, subject to the objection of defendants in error to the consideration by the court of any evidence or statement tending to show that they were not the owners of the land, for the reason that the same would be incompetent and immaterial, the plaintiff in error, by its condemnation proceedings and agreements, being estopped to deny their ownership; also subject to the objection of plaintiff in error that the tax deed was null and void upon its face, and insufficient in law to convey any title to defendants in error; and the further objection that the facts agreed upon were insufficient in law to authorize a recovery by defendants in error. The district court found the issues in favor of defendants in error, and rendered judgment for the stipulated damage. A motion for a new trial was filed by plaintiff in error, the grounds therefor being: *First*, That the finding and judgment were contrary to law; *Second*, That they were not

sustained by sufficient evidence; and *Third*, That upon the stipulation, the judgment should have been in favor of defendants in error for the amount of the tax lien admitted, and not for the value of the land. The motion being overruled, the cause is brought to this court by petition in error.

It is conceded by plaintiff in error that unless the tax deed is void upon its face, the judgment should be affirmed. It is contended by defendants in error that plaintiff in error is not in a situation to question their title.

If the position of defendants in error is correct it will then become unnecessary for us to examine as to the validity of the deed.

It must be observed that the answer of plaintiff in error fails to allege any facts which would render the deed void. It is true the ownership of defendants in error is denied. Then, why institute and maintain the condemnation proceedings against them? It is also true that the answer alleges that, prior to the date of the condemnation, defendants in error had purchased the forty acres—of which it was a part—at tax sale, and had paid certain taxes thereon; and that the sale was void, and did not convey any title. But why void? So far as the allegations of the answer are concerned the land was taxable when taxed. The taxes were legally levied, the sale lawfully made, and the deed properly executed. There is an entire absence of distinct facts showing the illegality of the sale or of the deed. This is not enough. *Southard v. Dorrington*, 10 Neb., 119. In the case cited, it is said that in an action at law for the possession of the premises under a tax deed, such an answer would probably be sufficient. But that is not this case. The holder of the original title does not attack the title of defendants in error, and the plaintiff in error proceeds against them directly as the owners.

But aside from the questions presented by the answer we can see no error in the decision and judgment of the district court. The plaintiff in error has recognized the

ownership of defendants in error at every stage of the case from its incipency. If the tax deed was void on its face no title was conveyed, and the vacation of the streets and alleys was without any legal effect. Yet plaintiff in error ignores the plat as surveyed and recorded by Durant, and proceeds against the land in one body according to the government survey.

Section 97, Compiled Statutes, Ch. 16, authorizes the appointment of commissioners to inspect real estate taken by a railroad company, if the owner shall refuse to grant the right of way through his or her premises. The refusal of the owner is jurisdictional. *Mills on Eminent Domain*, § 107. 1st *Redfield on Railways*, pp. 239 and 240. *Reitenbaugh v. Chester Valley Ry. Co.*, 21 Penn. St., 100. The petition in this case for the appointment of commissioners to assess damages alleged that the lands described in the petition appear to belong to defendant in error and others, but nothing is said as to Durant. It is also alleged that plaintiff in error had made application to the owners to purchase the right of way, but had been unable to treat with them for the purchase of the same, they refusing to grant the lands for the purposes required. Taking the record as our source of information, it is very evident that Durant was not one of whom it tried to purchase the lands. Durant is claiming nothing in this proceeding. For aught that appears he may have abandoned all claim to the land. There was no controversy before the commissioners as to ownership. The company, in our judgment, was estopped from denying the title or estate of defendants in error in the premises, or from asserting that they had any other title than that attributed to them in the proceedings to condemn. *Rippe v. Chicago, Dubuque & M. R. Co.*, 23 Minn., 18.

The judgment of the district court being, in our opinion, correct, for the reasons here given, it is unnecessary and would not be proper for us to discuss the question of the

validity of the tax deed as between defendants in error and Durant. Upon that question we express no opinion. The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

RILEY M. GRAVES, PLAINTIFF IN ERROR, V. H. T. SCOVILLE, DEFENDANT IN ERROR.

1. **Bill of Exceptions: AFFIDAVIT.** Affidavits used as evidence upon the hearing of a motion in the district court will not be considered in the supreme court unless preserved as a part of the record by a bill of exceptions. And when such papers are improperly attached to the record they will, upon motion, be stricken from the files.
2. **Arbitration: REVIEW ON ERROR: MOTION FOR NEW TRIAL NOT NECESSARY.** Where a cause is submitted to an arbitrator, without suit, under the provisions of title 28 of the civil code, and the arbitrator presents and files his award in the district court, such award may be attacked by a motion to reject and set it aside for any legal and sufficient reasons (§ 874, civil code). If such motion is overruled and judgment rendered upon the award, over the objection and exception of the party attacking it, the decision of the district court on such motion may be reviewed upon error without a motion for a new trial having first been made in the district court.
3. **—: AWARD.** An award of arbitrators must state the facts found by them and their conclusions of law separately. *Murry v. Mills*, 1 Neb., 456.

ERROR to the district court for Jefferson county. Tried below before MORRIS, J.

S. N. Lindley and Ryan Bros., for plaintiff in error.

Marquett, Deweese & Hall, for defendant in error.

17	593
19	538
23	252
24	393
17	593
32	299
17	543
36	634
17	568
39	523
17	593
46	887
17	593
50	155
50	893
52	551
53	210
17	593
57	763
17	593
58	214

REESE, J.

Before the final submission of this cause defendant in error filed two motions, one to strike from the record the affidavit of Riley M. Graves attached to the bill of exceptions, for the reason that it was not preserved as a part of the record by the proper bill of exceptions, there being no proof that it was considered by the district court in determining the motion to which it is attached. The other to "dismiss the appeal," for the reason that no motion for a new trial or to set aside the judgment was made in the court below.

These motions will be disposed of in the order of their filing, as above indicated. The cause was originally submitted to the arbitration of George W. Hanson, under the provisions of section 862 *et seq.* of the civil code. The submission was in writing, and provided that judgment should be entered upon the award by the district court of Jefferson county. The arbitrator returned his award to the district court. The plaintiff in error then filed a motion to set aside the award, alleging various reasons therefor, and so far as appears, in support of the motion attached thereto his affidavit, which in the motion is referred to as "marked exhibit 'A,'" and made a part of the motion. There is no bill of exceptions. The question presented by the motion is, whether or not, in the absence of a bill of exceptions, what purports to be a copy of the affidavit attached to the files is properly a part of the record.

Upon this question the decisions of this court have been substantially uniform, and it has, with one exception, we think, been held that affidavits used on a hearing in the district court must be embodied in a bill of exceptions in order to be available in the supreme court. In *Tessier v. Crowley*, 16 Neb., at page 372, Chief Justice COBB, in writing the opinion of the court, says: "It has been held

by this court in at least seven cases, substantially, that where evidence has been introduced in the court below which is not properly a matter of record, a party who desires to avail himself of such evidence in the supreme court must preserve the same by a bill of exceptions," citing the cases referred to, and to which might be added *Dorrington v. Minnick*, 15 Neb., 397. *Dolen v. The State*, Id., 405. *Emphie v. McLean*, Id., 629. *Thesing v. School District*, 16 Id., 134. *Frederick v. Ballard*, Id., 559, and others. In the same opinion, *Tessier v. Crowley*, the chief justice further says: "I do not think that anything can be said to belong to the record except the process, pleadings, and journal entries, including, of course, motions, the rulings thereon, references, reports of referees, instructions, verdict, and judgment; any matter of evidence, including affidavits, can only go upon the record by order of the court, and that is the office of a bill of exceptions." It is claimed that the affidavit of Graves does not fall within this rule because it was attached to the motion as an exhibit and made a part of it, and therefore under the rule laid down in *The Republican Valley R. R. Co. v. Boyse*, 14 Neb., 130, no bill of exceptions is necessary to its preservation in the record. The holding in *R. R. Co. v. Boyse* is directly overruled in *Tessier v. Crowley*, *supra*, and it seems to us correctly. It does not seem to the writer to be consistent with reason to say that the necessity of a bill of exceptions can be obviated by simply saying in the motion or paper to be supported by affidavits that they are attached and made a part of the motion. The purpose of a bill of exceptions is to identify the paper or instrument and designate it as the paper or instrument used on the hearing. If the rule can be obviated by making one affidavit a part of the motion, it can be with any number. A large number of affidavits are frequently filed with a motion and designated therein as a part of it. If one or two affidavits thus filed and designated are

made a part of the motion and of the record, one or two hundred can as easily be incorporated, and thus a bill of exceptions will only be necessary because the party filing counter affidavits had nothing of which he could "make them a part." But do such affidavits become a part of a motion by simply calling them such? By section 572 of the civil code a motion is defined to be "an application for an order addressed to the court or a judge in vacation by any party to a suit or proceeding, or one interested therein." It is an application for an order. The affidavits used in support of this application are simply intended to furnish proof of the existence of the facts set up or pleaded in the motion. If those facts already appear, whether by other proofs or a simple inspection of the record, no affidavits are necessary. We think there can be but one consistent rule upon this question, and that must be as stated in *Tessier v. Crowley, supra*. Of course, affidavits which are intended to be used as pleadings, and affidavits of verification simply, which are not used as evidence, but for the purpose of entitling a pleading to a place in the record, and not being used upon a hearing as evidence, would not fall within the rule here stated, but would continue to be a part of the record without the aid of a bill of exceptions. The motion to strike the affidavit from the files should, therefore, be sustained.

The position taken by defendant in error in his second motion cannot be sustained. No motion for a new trial was necessary. The award of the arbitrator did not include the testimony heard upon the trial and none of the evidence was passed upon by the district court. Section 874 of the civil code provides that "the award may be rejected by the court for any legal and sufficient reason, or it may be recommitted for a rehearing to the same arbitrators, or any others agreed upon between the parties." Upon the filing of the award plaintiff in error filed his motion to reject and set it aside, alleging, as he supposed,

"legal and sufficient reasons" therefor. This motion was overruled and judgment entered upon the award over the objections and exceptions of plaintiff in error. This was all that was necessary in order to procure a review of the decision of the district court upon the motion. The motion to dismiss is therefore overruled.

The cause having been finally submitted upon its merits, it becomes necessary to examine the record unaided by any of the proofs before the district court. The only objection to the award which it is thought necessary here to notice is contained in the first and second objections thereto in the petition in error, and which may be said to strike at the sufficiency and validity of the award. This award consists mostly of a simple tabulated statement of an account. Its caption is as follows:

"Commenced business March 5, 1879; R. M. Graves in account with Graves and Scoville; amount of credits on ledger, and interest on same to March 25, 1883, at ten per cent per annum." The only finding of fact contained in the award is "that there is due from the said R. M. Graves to the said H. T. Scoville, under and by the matters in difference and controversy as set forth in said articles of submission, and submitted to me by the said parties, the sum of one thousand six hundred and fifty-six dollars and eighty-eight cents." The submission is of a partnership account of several years' business and involves the consideration of large sums of money paid out and received by the parties, as well as time and other things of value contributed and received by them. The award is defective in many particulars which we need not notice specifically here. It is not specific or direct and does not, in fact, amount to an award under the provisions of the code. It should state with particularity the amount invested and received by each partner, including as near as practicable the items of payment and of receipt, so that a court in passing upon it could do so understandingly. Section 867 of the civil code

provides that, "All the rules prescribed by law in cases of referees are applicable to arbitrators, except as herein otherwise expressed, or except as otherwise agreed upon by the parties." By reference to section 300 of the code it will be seen that referees "must state the facts found and conclusions of law separately, and their decisions must be given and may be excepted to and reviewed," etc.

In *Murry v. Mills*, 1 Neb., 456, it was held that the provisions of section 300 are by section 867 made applicable to the report of arbitrators, and that such report must, to have any validity to support a judgment, state the facts found by the arbitrator and the conclusions of law thereon separately. The award in this case was objected to, but the objections were overruled and judgment rendered thereon over the objections and exceptions of plaintiff in error. This, as we have seen, was error.

The decision and judgment of the district court are reversed, and the cause remanded to the district court with direction to reject the award.

JUDGMENT ACCORDINGLY.

THE other judges concur.

GEORGE W. PRATHER, PLAINTIFF, v. JOHN R. HART,
DEFENDANT.

1. **Office: VACANCY.** Where it appears *prima facie* that acts or events have occurred subjecting an office to a judicial declaration of being vacant, the authority having the power to fill such vacancy, supposing the office to be vacant, may proceed, before procuring a judicial declaration of the vacancy; to appoint or elect according to the form of law a person to fill it. *Leal v. Jones*, 19 Ind., 356.
2. ———: **COUNTY JUDGE: TEMPORARY APPOINTEE.** A vacancy

Prather v. Hart.

may exist in the office of county judge, although the duties of such office are being discharged by a person temporarily appointed by the proper authority.

3. ———: ———: CASE STATED. Upon the pleadings and evidence in the case, *Held*, That at the date of the filing of the information herein, the respondent, John R. Hart, was not entitled to the office of county judge of Franklin county, but did unlawfully intrude himself thereinto and did unlawfully hold and exercise the duties, franchises, and jurisdiction thereof.

QUO WARRANTO.

J. R. Webster, for plaintiff.

A. F. Moore, for defendant.

COBB, CH. J.

The constitution of the state, section 20 of article 8, provides that, "All offices created by this constitution shall become vacant by the death of the incumbent, by removal from the state, resignation," etc. The statute, section 101 of chapter 26, Compiled Statutes, provides as follows: "Every civil office shall be vacant upon the happening of either of the following events at any time before the expiration of the term of such office, as follows: 1. The resignation of the incumbent. 2. His death. 3. His removal from office. 4. The decision of a competent tribunal declaring his office vacant. 5. His ceasing to be a resident of the state, district, county, township, precinct, or ward in which the duties of his office are to be exercised, or for which he may have been elected," etc. It appears from the pleadings and testimony in this case that one Daniel Brown was, at the general election of 1883, elected to the office of county judge for Franklin county. His term of office commenced on the first Thursday after the first Tuesday of January, 1884, and would expire by its own limitation two years from that date. But it also appears from the said pleadings and testimony that he removed from the

state on the 2d day of June, 1884, and has never returned. The fact of such removal is not denied, but is admitted by the defendant. But his contention is, that such removal was not intended to be permanent but merely temporary. No doubt the word "removal" was used in the constitution in the same sense as the words "ceasing to be a resident of," as used in the provision of the statute above quoted. Section 31 of the chapter last above cited gives us a key to the construction of this language as applicable to a person who has been absent from the state, but has returned and offers his vote at an election. Indeed it gives us two keys, and leaves it quite uncertain which is the one applicable to the question in hand. The *second* clause of said section is as follows: "A person shall not be considered or held to have lost his residence, who shall leave his home and go into another territory or state, or county of this state, for temporary purposes merely, with the intention of returning." While the *fifth* clause is as follows: "If a person remove to another state or territory, intending to remain there for an indefinite time and as a place of present residence, he shall be considered and held to have lost his residence in this state, notwithstanding he may intend to return at some future period."

As above stated, these rules are applicable to persons offering to vote at an election at the place of the former or general residence, and in the light of an actual return thereto, and if at all applicable to the case at bar it lacks the important circumstances of the actual return of the absentee.

The testimony on the point of the intention with which Judge Brown left the state is conflicting, to say the most of it. On the day of his departure he addressed a communication to the county board, saying: "As I am going away to be temporarily absent for a few weeks, I must respectfully ask that you appoint Hon. John R. Hart to act as county judge of said county during such absence."

The defendant, whose deposition was taken in his own behalf, and read at the hearing, testified as follows :

Int. 3. Did you ever have any conversation with Daniel Brown in regard to his intended absence from this county in and subsequent to the summer of 1884? If so, state what he said.

A. Yes. At about the last of April or first of June, 1884 Judge Brown told me that he was going to make a trip to Dakota to see his son and son-in-law. He spoke to me about acting as county judge during his absence; he said that he would leave a request with the county commissioners that I be appointed during his absence.

Int. 4. Did he, in these conversations, or any other time, state how long he intended to be absent, and when he expected to return? If so, state what he said.

A. The only definite time I remember of was six weeks.

I. E. Kelly, a witness on the part of the defendant, also testified to a conversation with Judge Brown as follows: "Talking of leaving the town, he said he was going to make a visit to some of his relations, either a son or son-in-law." No date is given to this conversation. Henry Runby, also a witness for defendant, testified that he had a conversation with Judge Brown, the date of which is not given, in which he said "he was going to take a trip up in Dakota to see his son." E. H. Marshall, a witness for respondent, testified: "I had conversation with Judge Brown several times concerning his trip to Dakota; can't say he expressed the nature of his absence, only that he had a son up there; was going up to see his son and the country, and see how he liked it." No date is given to any of these conversations.

A. F. Moore, also a witness on the part of defendant, testified as follows:

Int. 5. State if you had any conversation with said Daniel Brown during the spring and summer of 1884,

wherein the nature of his intended absence from the county was discussed?

A. I did have two such conversations with him.

Int. 6. State what was said?

A. The first conversation was on the porch of the Tremont Hotel, I should think the latter part of May, 1884. The conversation was commenced about a law suit which had been tried on that day; subsequently Brown spoke of intending to go to Dakota to be absent several weeks. He said he was going to take some of his children to Dakota and have them locate there. That while in office he was not able to be at home except on Sundays, and he could take his children to Dakota and he and his wife could then reside alone in Bloomington during the rest of his term. The other conversation was a few evenings later, and was in front of the post-office. The conversation commenced about an amusing law suit in which the parties and witnesses were all French. He said there was a ludicrous, and he supposed a tedious, case then pending in his court, in which all the parties and witnesses were French, and he said that he did not expect that case to be tried before him, because when he went away he expected to be gone a number of weeks, and he supposed some one would be appointed to act as county judge during his absence, and this case would be one of the cases to be tried.

On the other hand, Ira E. Cadman, whose deposition was taken on the part of the plaintiff, and used at the hearing, testified as follows:

Q. State all the facts and circumstances in regard to said Daniel Brown, his acts and conduct preparatory to his departure from this county, and preparation therefor, indicating his intention to remain absent permanently, or to return to this county?

A. I heard he was going to remove; heard at another time he was not going to remove. I went and saw him in person a month or two before he went away, asked him

Prather v. Hart.

if it was a fact that he was going to leave us. He said yes. I asked, "For good?" He said, "Yes, for good." I asked him "Who would be apt to get the appointment to fill the vacancy caused by his removal." He told me he did not know. I told him I had understood that he was going to resign in favor of John R. Hart. He said he was not going to resign in favor of anybody, but simply hand in his resignation.

Charles Y. Rickett, whose deposition was also taken on the part of the plaintiff, testified as follows:

Q. Have you heard at any time any conversation or statement in which he expressed his intention in regard to his intended absence being permanent or temporary?

A. I did.

Q. What was said at said conversation or conversations?

A. Had several talks with him. He often spoke of resigning the position of county judge and going to Dakota to live with his sons; and he said he would not resign but would go away and let the commissioners put in anybody they wanted to, that he did not intend to come back, and also wanted me to go there with him and open a printing office.

Q. When did this conversation occur?

A. Along in March and April, 1884.

J. R. McDonald, whose deposition was also taken on the part of the plaintiff, testified as follows:

Q. Have you heard at any time any conversation or statements of said Brown, either before he left this county or since that time, in which he expressed his intention in reference to his absence or in regard to his return to Franklin county?

A. Immediately after election in the fall of 1883, he told me that it did not make any particular difference if he had been beaten in the election, for he said he was going to Dakota where his boy was; I said, "Not to move, are

you?" He said, "Yes." I said, "Then there will be another fight for county judge next fall." He said, "Yes." He said he intended to go this fall—the fall of 1883; if not, then in the spring of 1884. He also told me between the first and tenth of April, 1884, that he was going to move to Dakota, up where his son was.

All of the above named witnesses and a great many others testified to the fact that said Daniel Brown sold off his farm and most of his personal property previous to his leaving for Dakota, and that he took with him all of his personal property which he had not sold. One or two witnesses thought that the sale of his farm took place before his election. All of them fixed the time of the sale of his personal property as about the tenth of May, 1884. All of them agreed that he took his family with him, except one, who stated that his family went on before him. All agreed upon information and belief that he went directly to Spink county, Dakota, and has never returned.

The act of February 20, 1883, entitled "An act to amend sections 108 and 107 of chapter 26," etc., provides that "vacancies occurring in any state, judicial district, county, precinct, township, or any public elective office, thirty days prior to any general election shall be filled thereat. Vacancies occurring in the office of county judge or justice of the peace shall be filled by election, but when the unexpired term does not exceed one year, the vacancy shall be filled by appointment as provided in section 103." Comp. Stat., Ch. 26.

Thirty days before the general election of 1884 was the 5th day of October of that year, so the question upon which this case turns is, was there a vacancy in the office on that day? In considering this question the fact that the defendant had been appointed by the proper authority to perform the duties of the office temporarily, is a circumstance of no significance. Had Judge Brown sent in his unconditional resignation instead of the paper which he

did send to the county board, or had he died on that day, doubtless it would have been the duty of the county board to appoint some competent person to discharge the duties of the office until the election at which such vacancy could be filled. See § 105, Chap. 26, C. S. In this connection I will remark that the county board evidently had the provisions of the above section in view when they appointed the defendant; the language of such appointment being, "That John R. Hart be and he is hereby appointed temporary county judge until the return of Daniel Brown, or until his successor is elected and qualified." It is a part and indeed the chief point of the defendant's contention, that the appointment of the defendant as temporary county judge amounted to an adjudication by the county board that the absence of Daniel Brown was but temporary, and that such adjudication, not having been appealed from is final, and cannot be attacked collaterally. It might be a sufficient answer to this argument to observe, that in making appointments the county board do not act judicially, and none of the qualities of judgments or findings attach to such proceedings. But as above intimated, it is with the status of the office as fixed by the removal and continued absence of the regular incumbent on the 5th day of October, 1884, that the consideration of this subject has to do.

If, when Judge Brown left the state, he had the intention to remain away indefinitely, the office thereupon became vacant instantly. If, on the other hand, he at that time intended to return to Franklin county within a period which, compared with the balance of his term of office, might be called "temporary," then he continued to be the incumbent of the office. But for how long? Certainly for no longer than he continued to have the intention to return, to make his absence but "temporary." Then if it be conceded that at the time Judge Brown left the state he intended to return within a definite time, and that that time was sufficiently short as to come within the meaning of the

word temporary, when compared to the term of his office, then did he continue of that mind and intention until the 5th day of October following? All the direct evidence we have on that point is contained in a copy of a letter written by Daniel Brown to the defendant under date of August 23, of that year, and an original letter written by him to John C. Grove, an old friend and former neighbor, of Franklin county, dated August 24. The first letter is devoted chiefly to finding fault with parties in Franklin county for treating the office as vacant, etc. He uses the following language: "I expect, if nothing happens, to return and assume the duties of the office of county judge about the 15th of November. * * * Hope you will have the office in good shape when I return. I will let you office with me. Am having a nice time visiting with my son-in-laws." This letter was written in reply to one to him from the defendant, which is not produced. Were it before us it would probably throw considerable light on what we have. The other letter, written the next day to Mr. Grove, is much such a letter as one farmer who had moved to a new country and was well pleased with the change would write to another whom he had left behind in the old one, and with whom he was on intimate terms of acquaintance, and whom he wished to induce to follow him. Not a word is said about an intention to return to Nebraska, but, on the contrary, most of the letter is devoted to a highly flattering description of Dakota, and wherever Nebraska is mentioned it is in terms of comparison inconsistent with the voluntary return of the writer from Dakota to Nebraska. He says: "There are three railroads within view of us, one six miles, one twelve miles, and one twenty miles. We can see the towns on all of these roads from our place. * * * Mother (meaning his wife) says tell Mrs. Grove there is such a nice 160 acres just across the road from ours, and no one living on it, that could be

bought cheap, and that she wished you was here and living on it so she could go over and see her. We have splendid neighbors."

There was about six weeks between the date of these letters and the fifth day of October, and whatever may have been the mind of the writer at the former date, the fact that he remained away and had not returned to this state at the time of the taking of the testimony, May 5, 1885, raises the presumption that the *animus revertendi*, if it ever existed in his mind, had given place to other intentions before the fifth day of October. The central and public facts were, that the county judge had sold off his property, left the state with his family, and had not returned. The time was approaching for the holding of the annual election, when it was the right of the voters to fill the vacancy caused by such removal. It was, therefore, the duty of the county clerk in publishing the notice for such election to include therein the office of county judge; this was done, and at the election the plaintiff was duly elected.

The point is made by the defendant that the plaintiff had not taken the oath of office as required by law, and the form of oath actually taken by him is given. Had the defendant made that the ground of his refusal to turn the office over to the plaintiff when demanded, we might have deemed it necessary to decide the point of the sufficiency of the form of the oath, but having resisted, on the claim that there was no vacancy to be filled at the said election, it is deemed necessary only to say that the form of oath taken by the plaintiff is that commonly, if not universally, used by county officers throughout the state.

The judgment of the court therefore is, that at the date of filing the information herein the defendant was not entitled to the office of county judge of Franklin county, but did unlawfully usurp the same, and intrude himself there-

into, and did unlawfully hold and exercise the duties, franchises, and jurisdiction thereof.

The usual writ of ouster will issue against him.

JUDGMENT ACCORDINGLY.

THE other judges concur.

HENRY C. JOHNSON, PLAINTIFF IN ERROR, V. JERUSHA
A. ELLIS, DEFENDANT IN ERROR.

1. **Pleading:** STATING CAUSE OF ACTION. In a petition for goods, wares, and merchandise sold and delivered, the items, in stating the account in the following words: "To insurance, \$6," "To balance on oats, check, \$6.30," without explanation, *Held*, Not sufficient to constitute a cause of action.
2. **Verdict.** Upon the whole case, *Held*, That the verdict of the jury is not sufficiently unjust or unsupported by the evidence to justify a reversal of the judgment.

ERROR to the district court for Fillmore county. Heard below before MORRIS, J.

J. W. Eller, for plaintiff in error.

John P. Maule, for defendant in error.

COBB, CH. J.

There are but two errors assigned in this case, to-wit:

"1. The court erred in admitting in evidence the books of account of defendant.

"2. The court erred in overruling the motion for a new trial, on the ground that the verdict of the jury is not sustained by the evidence and is contrary to law."

Upon an examination of the pleadings and bill of exceptions it is quite apparent that the controversy turns

upon the question whether the price of wind-mill, tower, etc., furnished by Johnson to the Ellises was included in the settlement of December 1, 1881, or not. There is testimony on both sides of this question, and I do not understand it to depend at all upon the account books. I do not understand that the books were or could be properly received in evidence for the purpose of proving a settlement, or of proving what was included in such settlement, if one was had. William Bosserman and J. K. Ellis, witnesses on the part of the defendant, testified to such settlement, and that the wind-mill, tower, etc., were included in it. The plaintiff, testifying in his own behalf, says that there was a settlement between the parties on the first day of December, 1881, but that neither the wind-mill, pump, or any account relative thereto were included in such settlement, and he gives a very good reason therefor, to-wit, that the account for the wind-mill, etc., was not due at that time. And still the jury must have believed that the price of the wind-mill, tower, etc., was included in the settlement, as testified to by the witnesses Ellis and Bosserman. And this was a question peculiarly for them. If this account was in fact included in the settlement, then it makes no difference whether it was due or not.

As to the two items of "Insurance, \$6," and "Balance on oats, check, \$6.30," while they were undoubtedly taken into consideration by the jury, neither of them as set out in the petition constituted a cause of action. The first was probably intended to mean money paid by the plaintiff as premiums on a policy of insurance for the benefit of the defendant, but the petition contains no such allegation. The last probably means a balance of oats stored with the defendant. But to hold her for such balance in an action for goods, wares, and merchandise sold and delivered, allegations of such storage, as well as a demand for the oats stored, as well as proof to that effect, and of demand and refusal, was necessary.

Upon the whole case there seems to have been a somewhat lengthy course of dealings between the parties, evidenced by complicated and scarcely intelligible accounts on the books of both sides. There had been one or two settlements between them, and a misunderstanding as to what was included in such settlements. These matters were brought before the court, and, we must presume, as no objection is made as to the charge or instructions of the court, fairly submitted to a jury, and it cannot be said of their verdict that it is sufficiently unjust or unsupported by evidence to warrant a reviewing court in setting it aside.

The judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17 610
46 578

THE STATE OF NEBRASKA, EX REL. CHARLES E. BESSEY,
v. H. A. BABCOCK, AUDITOR OF PUBLIC ACCOUNTS.

State University: POWER OF REGENTS OVER FUNDS. The regents of the university, in the absence of an appropriation by the legislature, have no power to dispose of the endowment fund or that derived from the $\frac{1}{4}$ mill tax. *Regents v. McConnell*, 5 Neb., 423, *State v. Liedtke*, 9 Neb., 468, adhered to.

ORIGINAL application for mandamus.

O. P. Mason, S. J. Tuttle, and T. M. Marquett, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, J.

On the twenty-fifth of March, 1885, the board of regents passed the following resolution: *Resolved*, That the sum

of two hundred and fifty dollars be and the same is hereby appropriated out of any money now in the custody of the state treasurer belonging to the regents' fund, and in the general account thereof, the same to be drawn by Prof. Bessey, dean of the industrial college, to be used in payment of work and material on a botanical garden for said college." Thereupon an order was issued by the president and secretary of the board, as follows:

"SECRETARY'S OFFICE,

"LINCOLN, NEB., March 26, 1885.

"This is to certify that Prof. Charles E. Bessey or order is entitled to two hundred and fifty dollars for work and materials on a botanical garden for the industrial college, payable from the regents' fund, and the general account thereof, in accordance with resolution of the board of regents dated March 25th, 1885, and the state auditor is hereby directed to draw his warrant for the above amount on the regents' fund, in pursuance of an act of the legislature approved February 23d, 1875."

The order was thereupon presented to the auditor, who refused to draw a warrant, for the reason that "the legislature of Nebraska has not made an appropriation from the regents' fund on which to draw warrant for the same." The relator then brought this action to compel the auditor to draw his warrant on the regents' fund for the sum stated, upon the ground that the fund named being derived from interest from sales of university and agricultural college lands, rents received for leases of the same, and the three-eighths of one mill tax levied for the support of the University, was thereby appropriated and placed under the control of the regents, and that no further appropriation of the same was necessary. It was stated on the argument, and not denied, that the legislature had appropriated out of the "general fund" the sum of \$134,000 for the support of the university for the years 1885 and 1886. And from the exhibits filed with the application, the regents'

fund now on hand, in round numbers, amounts to the sum of \$110,000; the annual income from interest and rents of the agricultural college and university lands is nearly \$40,000, with a portion of the land still undisposed of; while the three-eighths of one mill tax cannot bring in less than \$50,000 per annum. There would thus be placed at the disposal of the regents for two years not less, probably, than \$420,000, which may perhaps be increased considerably, that, should the writ be granted, would be placed at the disposal of the regents for the years 1885 and 1886.

In 1869 the legislature passed an act creating the "University of Nebraska," and declared that, "The object of such institution shall be to afford to the inhabitants of the state the means of acquiring a thorough knowledge of the various branches of literature, science, and the arts." Comp. St., Ch. 87. This act created the board of regents, and defined their powers. Sec. 10 of Art. 8 of the constitution of 1875, also provides that, "the general government of the university of Nebraska shall, under the direction of the legislature, be vested in a board of six regents, to be styled the Board of Regents of the University of Nebraska, who shall be elected by the electors of the state at large, and their term of office, except those chosen at the first election as hereinafter provided, shall be six years. Their *duties and powers* shall be prescribed by law," etc.

The question as to their power over the university funds was before this court in *Regents v. McConnell*, 5 Neb., 423. In that case they brought an action against McConnell to recover the "sum of about \$3,500, moneys belonging to the regents' fund, which came into the hands of the defendant as treasurer of the university, under his appointment by the regency." The opinion was written by Chief Justice GANTT, who said (page 428): "Under the act of 1869 the university corporation had no control over or disposition of the endowment fund, and now by the act of

February 25, 1875, the legislature has deemed it proper to abolish the office of treasurer of the university, and to make the state treasurer the custodian of the funds appropriated for the support and maintenance of the university, to be disbursed by him upon warrants drawn by the state auditor, in the same manner as funds appropriated for the support of other state institutions not incorporated are disbursed. Hence, by this latter act, the custody and control of these funds are taken from the corporation and placed in the custody of the state treasurer for disbursement, and under the settled rule of law, in respect to public corporations of this kind, the legislature had the undoubted authority to take these funds from the custody of the corporation and divest it of any corporate power over them, and having done so, we think it clear that the regents as such corporation have no authority in law to *bring or maintain this action.*" The same question was again before the court in *State v. Liedtke*, 9 Neb., 468, the opinion being written by the present chief justice, and it was held in effect that without an appropriation by the legislature "no such funds or any other funds once in the state treasury can be drawn out," and because there was no appropriation from the regents' fund, the court refused to compel the auditor to draw a warrant thereon.

These decisions were rendered by an unanimous court, after full and careful consideration of the question, and are decisive of this case. The regents, therefore, in the absence of an appropriation by the legislature, have no right to appropriate any part of the regents' fund. That the legislature should make ample appropriations for the support of the university will be conceded, and that it will do so there is but little doubt. Ample appropriations have been made, so far as appears, for the support of every department of the university and agricultural college, authorized by the legislature for the years 1885 and 1886. No attempt has been made or will be made, or is threatened, to divert the

funds to any other purpose, or in any manner to defeat the object of the grant. It is well known that the bill making appropriations for the university and agricultural college provided that the money should be appropriated out of the regents' fund; but, by some means, during its passage, the provisions of the bill were changed, making the appropriation out of the general fund. As the same mistake occurred a few years ago, and it is well known to be a mistake, it shows a want of care on the part of those having the matter in charge. The alleged mistake, however, materially adds to the burdens of taxation of the people of the state, but does not in the slightest degree affect the efficiency or usefulness of the university. The regents, however, can only use such funds as are placed by the legislature under their control. It follows that the writ must be denied.

WRIT DENIED.

REESE, J., concurs.

COBB, CH. J., dissents.

THE STATE OF NEBRASKA, EX REL. ANDREW E. HARVEY, V. JOEL A. PIPER.

1. **Constitutional Law: SPECIAL LEGISLATION: ORGANIZATION OF COUNTIES.** A special act of the legislature, which provides that certain territory, the boundaries of which are given, shall be designated Harlan county, appoints certain persons commissioners, and requires them within thirty days to call an election for the purpose of electing county officers and selecting a site for a county seat, is not in conflict with the constitution, which inhibits the conferring of corporate powers by special act.
2. **Registration of Voters.** The registration law is to be used as a shield and not as a sword; as a means to prevent illegal voting, and not to disfranchise the voters of a county or its subdivisions; therefore, where a statute limits the time for hold-

State v. Piper.

ing an election to a less number of days than is required for the registration of voters, and no registration is had, the votes cast at such election will not on that account be illegal.

3. **County Seat: LOCATION: IRREGULARITIES IN ELECTION.** At an election held in Harlan county on the 3d day of July, 1871, in pursuance of the statute, the place which received a majority of all the votes cast thereby became the county seat of that county; and the court will not in collateral proceeding, fourteen years afterwards, inquire into irregularities at such election where no direct proceedings have been had to set it aside, and the place thus designated has been in fact the county seat since the year 1876.

ORIGINAL application for mandamus.

W. S. Morlan, for relator.

John Dawson and Lamb, Ricketts & Wilson, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendant to hold his office on the S. W. $\frac{1}{4}$ of section 16, township 2, range 19 west, in Harlan county, which, it is claimed, is the county seat. It appears from the record that on the 3d day of June, 1871, a special act was passed by the legislature prescribing the boundaries and providing for the organization of Harlan county. Laws 1871, 192. The second section of the act is as follows: "That Thomas D. Murrin, James O. Phillips, and Mark Coad are hereby appointed commissioners, who shall, within thirty days from the passage and approval of this act, call an election of the qualified voters of said county. They shall give twenty days' notice of said election by posting notices in at least five of the most public places within said county. Said voters when so assembled shall proceed to the election of one county clerk, one probate judge, one county treasurer, one sheriff, one coroner, and three county commissioners. At the same time and place said voters shall desig-

nate upon their ballots the *place of their county seat*, and the place receiving a majority of all the votes cast shall be the county seat of said county of Harlan. Said election shall be conducted and the votes canvassed as at general elections."

The following notice was thereupon published in said county:

"ELECTION NOTICE.

"In pursuance of an act of the legislature, passed and approved June 3d, 1871, creating and organizing the county of Harlan, an election will be held on the 3d day of July, 1871, for the purpose of electing one county clerk, one probate judge, one county treasurer, one sheriff, one coroner, and three county commissioners. At the same time and voting places, voters will designate on their ballots their choice of location for the county seat of Harlan county, Nebraska. The following places are designated as voting places: For those living on Prairie Dog creek, Ryder's house; for those living west of the east line of the county and west of Murrin's tent, at J. W. Foster's house; for those west of Murrin's to end of county, Mr. Squier's house.

(Signed.)

T. D. MURRIN,

"J. O. PHILLIPS,

"Commissioners."

At the election held in pursuance of the notice, Alma City (Sec. 33, T. 2 N., R. 18 W.) received thirty-seven votes, and sections 23 and 26, T. 2, R. 19 W., received five votes. The returns are certified to by "Thos. D. Murrin and Mark Coad, county commissioners." The next year, acting Governor James issued a proclamation calling an election for the election of county officers and the selection of the county seat. Under this proclamation an election was held in said county in June, 1872, for the election of county officers and the location of the county seat. At this election, Alma received thirty-two votes, Republican City, fifty-seven votes, and the S. W. $\frac{1}{4}$ of Sec. 16, T. 2, R. 19 W., thirty-six votes for county seat. Another election was

called and held in August, 1872, at which, it is claimed, the S. W. $\frac{1}{2}$ of Sec. 16, T. 2, R. 19 W. had a majority of the votes cast. The record shows that, in consequence of the various elections, there was a great deal of contention and uncertainty as to what place was the county seat of that county; that in 1876, apparently by common consent, the records of the county were removed to Alma; and the county offices have been kept at that place from that time until the present.

The first question presented is, the validity of the election of July 3d, 1871. It is claimed:

First, That the act is unconstitutional, as it confers corporate powers by a special act. The practice in this state, both before and since the adoption of the constitution of 1875, has been for the legislature to create new counties by special acts; and from the nature of the case it is, to some extent at least, necessary to do so. We do not think that merely prescribing the boundaries of a county and providing the machinery by which it may be organized is within the prohibition of the constitution. Strictly speaking, it is not a conferring of corporate powers, but rather, providing the means by which they may be exercised. The corporate powers are conferred by the general law regulating counties, and not by the act prescribing their boundaries. The first objection, therefore, is untenable.

Second, That two of the commissioners had no authority to call the election. In answer to this objection it is sufficient to call attention to the statute then in force. Sec. 7, Ch. 9 of the Revised Statutes of 1866, provides that "when only two of the commissioners of the board shall attend, and be divided on any question, they shall defer a decision until the next meeting of the board, and then the matter shall be decided by a majority of the board;" clearly implying that if there is no disagreement two may decide in the first instance; and such has been the constant practice in this state ever since the year 1856, when the commissioner act was

passed. The special commissioners appointed for the purpose of organizing a new county are governed as to their duties, where there are no special provisions to the contrary, by the general law relating to county commissioners. There is nothing, therefore, in the second objection.

Third, That there was no registration of the voters. It will be observed that the act of June 3, 1871, required the commissioners named to call an election within thirty days from the date of the approval of the act, and to give *twenty days'* notice by posting notices, etc., of the election. At the time of the passage of this act, Harlan county had no railway communication, and it would require several days for a messenger to reach that point from Lincoln by the most direct and favored route. As the registrars were required to commence registering voters more than thirty days preceding an election, it is very evident that the registration law did not apply to that election. While the statute provided that the registration law should apply to all elections, yet the provision must be construed with reference to the statute under which the election was held. If the statute requires the election to be held within a shorter period than that provided for the registration of voters, the presumption is that the registration law was not intended to apply to that election, the provisions of the two acts being inconsistent. The registration law is to be used as a shield, and not as a sword; as a protection against illegal votes, and not as a means of disfranchising the people of a whole county, or any of its subdivisions. The failure in the registration of voters, therefore, did not render the election invalid.

It is said, however, that the election was fraudulent, and that nearly all the votes cast thereat were illegal. These assertions are made fourteen years after the election was held, and it is impossible for us to determine in this collateral proceeding their truth or falsity. This much the record discloses, of which there is no doubt: That an elec-

tion was held on the 3d day of July, 1871, for the location of the county seat; that thirty-seven votes were given for Alma, to five for other points. The presumption is, that these were legal votes. The relator's attorney does not contend that they were all illegal. He says the election was generally treated as void; but the fact that for nine years the county seat has practically been located at Alma would seem to refute that assertion.

It is desirable that controversies in regard to a county seat should be settled as speedily as possible. The tendency of such controversies is to create more or less bitterness between the friends of rival points, and not unfrequently retarding to some extent the prosperity of all.

The business of certain officers, too, must be transacted at the county seat; and where parties have tacitly acknowledged and recognized a certain point as the county seat, and without seeking to contest the matter or raise an issue on that point for years, until after a large amount of important business has been transacted, the validity of which would be, or rather might be, called in question if it was declared the county seat never was located there, should be estopped from questioning the validity of the location. A party must act with reasonable promptness in such cases, and the courts should refuse to enquire into or enforce stale claims. We therefore hold that the county seat of Harlan county is at Alma. The proclamation of 1872, of acting Governor James, was unauthorized and of no validity, and the elections held thereunder void. It follows that the writ must be denied and the application dismissed.

JUDGMENT ACCORDINGLY.

REESE, J., concurs.

COBB, CH. J., dissents.

17	620
19	438
19	677
19	680
17	620
28	191
28	195
29	318
17	620
42	186
17	620
38	45
38	319
17	620
49	270
54	219
17	620
62	235

WILLIAM McHUGH, APPELLANT, V. JOHN A. SMILEY
ET AL., APPELLANTS, AND ELLEN P. FORBES ET AL.,
APPELLEES.

1. **Mortgage: LIEN.** A mortgage of real estate merely creates a lien thereon as security for the debt, and is not a conveyance as at common law.
2. **Homestead.** The homestead law in force when a contract was entered into is the law applicable to such contract.
3. ———: **SALE UNDER ACT OF 1867.** Under the homestead law of 1867 the homestead of a debtor is not liable to sale upon attachment or execution so long as it is owned and occupied by the debtor. A judgment rendered in a court of record in the county where the homestead is situated will be a lien upon such homestead, which will become operative upon the sale or abandonment of the homestead by the debtor.
4. ———: ———: **CONFIRMATION OF SALE.** The *ex parte* confirmation of the sale upon execution of a part of the homestead is not such an adjudication as will deprive a party who actually owns and occupies the same of his right of homestead.
5. ———: ———: **CASE STATED.** On the facts presented by the record, *Held*, That there had been no sale and abandonment of the homestead, and sheriff's deeds for portions of the same were annulled, the sales set aside, and the lien of the judgments re-instated.

APPEAL from Douglas county. Heard below before
NEVILLE, J.

George M. O'Brien, for appellants.

H. D. Estabrook, George W. Doane, and James W. Savage, for appellees.

MAXWELL, J.

The principal question involved in this case is, whether or not John A. Smiley had sold and abandoned his homestead and thereby rendered operative certain judgment

McHugh v. Smiley.

liens existing against the same. There are also several minor questions which will be considered in their order. The court below found that Smiley had abandoned his homestead, and rendered judgment accordingly. McHugh and the Smileys appeal.

It appears from the record that John A. Smiley in the year 1872, and from thence continuously until the 22d of October, 1877, was the owner of the west half of the south-east quarter of section three, in township fifteen north, range thirteen east, in Douglas county, which during all that time was occupied as a homestead, and is now claimed as such.

In 1872 Alfred Burley and James H. Barlow recovered a judgment against Smiley for the sum of \$294.88 and costs.

In October, 1874, the Omaha National Bank recovered a judgment against Smiley for the sum of \$1,247.00.

In 1874 a judgment was rendered in the county court of Douglas county in favor of Littleton Waldron and against John A. Smiley for the sum of \$300, a transcript of which was duly filed in the district court.

In October, 1877, Smiley and wife executed a quit-claim deed of said premises to the plaintiff. The consideration named in said deed is the sum of \$1,873.88.

The plaintiff, in 1879, also purchased the interest of one Bryant, acquired by tax deed of said premises, the alleged consideration being the sum of \$1,940.00. He also paid other debts which need not be referred to. The Smileys continued to occupy the land in controversy after the execution of the deed, but the judgment creditors named, alleging that they considered the execution of the deed to McHugh as a sale and abandonment of the homestead by Smiley and wife, caused executions to be issued on their judgments and levied upon portions of said real estate. Sales took place under the several levies, which were thereafter without actual notice confirmed by the court and

deeds executed, the entire proceedings being *ex parte*. Afterwards a bond of defeasance from McHugh to the wife of Smiley was duly recorded.

In July, 1881, the plaintiff filed his petition in the district court of Douglas county to foreclose the alleged mortgage. Smiley and wife and the purchasers under the execution sales were made defendants. Issues were joined, and on the trial of the cause the court found "that the deed in the amended petition mentioned and described, executed by the said defendants, John M. Smiley and Anna M. J. Smiley, to the said plaintiff, of the eighty acres of land in said amended petition described, was given as security for the repayment of money to be advanced by the said plaintiff for the benefit of the said defendants, John A. Smiley and Anna M. J. Smiley, and that said deed was intended by the parties thereto to have the effect of a mortgage only, and the court therefore finds that the said deed was a mortgage only, and so intended by the parties; and that said plaintiff is entitled to an account of the amount due him from the said John A. Smiley and Anna M. J. Smiley, for and on account of the said moneys so advanced and paid out by him to them and for their benefit. And the court further finds that there is due to the said plaintiff from the said John A. Smiley and Anna M. J. Smiley, on account of said advances, including interest thereon up to the first day of this term of the court, the sum of \$8,045.00, to all of which findings the said defendants, Alfred Burley, Ellen P. Forbes, and James F. Morton, by their attorneys, respectively except."

The court then found in favor of Forbes, Burley, and Morton, and sustained their titles and rendered a decree of foreclosure. Neither of these parties appeal. This court, therefore, without considering the character of the deed from Smiley and wife to the plaintiff, will accept as conclusive in this case the finding of the court as above indicated, that the deed from Smiley and wife to McHugh was a mortgage.

It is claimed on behalf of the execution purchasers that a mortgage is a conveyance. In some of the states it is so held, but the common law rule has never prevailed in this state, it being held that a mortgage is a mere security creating a lien upon the mortgaged property, but conferring no title and vesting no estate. *Kyger v. Ryley*, 2 Neb., 28. *Webb v. Hoselton*, 4 Id., 318. *Tootle v. White*, 4 Id., 403. *Hurley v. Estes*, 6 Id., 386. *Gregory v. Hartley*, 6 Id., 362. *Simmons Hardware Co. v. Brokaw*, 7 Id., 405. *Buell v. Farwell*, 8 Id., 224. *Merriman v. Hyde*, 9 Id., 113. *Union Mutual Ins. Co. v. Lovitt*, 10 Id., 801. *Davidson v. Cox*, 11 Neb., 250. *Blanchard v. Jamison*, 14 Id., 246. *Forgy v. Merriman*, Id., 513. A mortgage in this state, therefore, is not a conveyance, and as it is not claimed that Smiley and wife removed from the land there was no abandonment. The homestead law in force when the contracts were made with the judgment creditors is the law to be applied in this case. *Dorrington v. Myers*, 11 Neb., 388. But as the date of the contracts does not appear, the law as it existed at the time the judgments were recovered will be applied.

Section 525 of the code as it existed at that time was as follows: "A homestead consisting of any quantity of land not exceeding one hundred and sixty acres, and the dwelling-house thereon, and its appurtenances, to be selected by the owner thereof, and not included in any incorporated city or village, or instead thereof, at the option of the owner, a quantity of contiguous land not exceeding two lots, being within an incorporated town, city, or village, and according to the recorded plat of such incorporated town, city, or village; or in lieu of the above, a lot or parcel of contiguous land not exceeding twenty acres, being within the limits of an incorporated town, city, or village, the said parcel or lot of land not being laid off into streets, blocks, and lots, owned and occupied by any resident of the state, being the head of a family, *shall not be subject to attach-*

ment, levy, or sale upon execution, or other process issuing out of any court in this state so long as the same shall be owned and occupied by the debtor as such homestead."

The law as it then existed withdrew the homestead from sale while it was owned and occupied by the debtor, by declaring that it was not liable to levy and sale upon attachment or execution. This court in construing this law followed the early decisions in Wisconsin and Minnesota under similar statutes, and held that where judgment was recovered against the debtor in a court of record in the county in which his homestead was situated, it became a lien upon the homestead that remained inoperative so long as the homestead was owned and occupied by the debtor as such. *Hoyt v. Howe*, 3 Wis., 752. *Folsom v. Carli*, 5 Minn., 337. *State Bank v. Carson*, 4 Neb., 498. *Eaton v. Ryan*, 5 Neb., 47.

In the case last cited it is said, "A judgment so entered has precisely the same effect, and creates the same lien upon the real estate of the judgment debtor as a judgment of the district court would have." General Statutes, 267, § 18. But this lien could not have been enforced by a sale of the premises under execution so long as they were owned and occupied by the debtor as his homestead.

In our view the premises in question were owned and occupied by Smiley and his family, and were not subject to levy and sale under the executions. But it is said that the confirmation of the sale cures all defects in the proceedings, and operates as an adjudication upon the homestead right, and *Rector v. Rotton*, 3 Neb., 171, is cited in support of this view.

That was an action to foreclose a mortgage on the homestead, and the court properly held that the provisions of section 516 of the code did not apply to a sale of the homestead under a decree of foreclosure. The decision is placed upon the ground that in the foreclosure of the mortgage the court merely enforces the contract of the

owner of the premises. It was held, too, that any matter of defense existing before judgment must be set up in the answer and could not be pleaded after the decree was rendered. We adhere to that decision, but it has no application to a sale upon execution. In an action to foreclose a mortgage the object of the action is to ascertain the amount due and obtain an order for the sale of the mortgaged premises. From the nature of the defenses which would defeat a decree directing a sale of property, they must be made before the decree is rendered; but no such rule applies where a judgment is recovered which must be satisfied out of such property of the debtor as can be levied upon. In such case, in *ex parte* proceedings at least, there is no opportunity to make a defense as in actions to foreclose. The lien of a judgment is subject to all prior liens either legal or equitable. *Metz v. State Bank*, 7 Neb., 165. *Galway v. Malchow*, Id., 285. *Mansfield v. Gregory*, 11 Neb., 297. *Leonard v. White Cloud Ferry Co.*, Id., 338. *Uhl v. May*, 5 Neb., 157. *Dorsey v. Hall*, 7 Neb., 460. If the homestead was claimed by the party in possession before the sale was confirmed, and decided adversely to him, such adjudication probably would be conclusive upon him as a final determination. But if the proceeding is *ex parte* the party claiming the homestead cannot be deprived of the same without a hearing. As there was no notice given to either Smiley or wife, and no appearance by them, the sale and confirmation thereof did not affect the homestead right of Smiley. As the entire tract possessed by him was less than 160 acres no selection was necessary on his part to entitle him to the premises as a homestead. It follows that the decree, so far as it declared the sales under the executions in question valid, and that the title passed thereby, must be reversed and set aside and wholly annulled. And in order that complete justice may be done as far as possible between the parties, the sheriff's deeds under the execution sales are hereby canceled, the

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sales under the executions set aside, and the liens of the judgments are re-instated against said real estate. Should a sale of the property take place under the decree of foreclosure, and the title of Smiley be divested, such liens would then become operative to be enforced against said premises. Judgment will be entered in this court in conformity to this opinion.

JUDGMENT ACCORDINGLY.

THE other judges concur.

SAME V. SAME.

17	626
18	631
17	626
28	195
17	626
31	863
32	331
17	626
37	812
17	626
43	888
17	626
39	407
17	626
48	706
17	626
52	423
52	497
17	626
56	507
17	626
62	230

1. **Practice in Supreme Court on Appeal.** In an action in equity appealed from the district to the supreme court, if the interests of the parties appealing are so united with the others as to require the taking up of the whole record, the entire case will be reviewed.
2. **Deed of Homestead Held to be a Mortgage.** An absolute deed of a homestead the title of which was in the husband, was made as security for a debt, an agreement to reconvey upon the payment of the debt being made to the wife; *Held*, That the deed was a mortgage.
3. **Homestead: CONSTRUCTION OF STATUTE.** The law in force when the contract is made governs as to the right of homestead. Where, under the homestead law of 1877, a deed of the homestead was executed by both husband and wife, as security for a debt, the fact that the husband, without the consent of the wife, took a lease of the premises from the grantee in the deed, will not affect the homestead right.
4. ———: **OCCUPANCY.** An agreement to transfer the title of the property from the husband to the wife will not destroy the right of homestead, if the premises continue to be occupied by the debtor and his family as their home. *McMahon v. Spielman*, 15 Neb., 653.
5. ———: ———: **SALE WHILE OCCUPIED CONVEYS NO TITLE.** A party purchasing part of a homestead in the actual occupation of the family, at a sale under an ordinary execution, will not acquire a title if the property was exempt.

REHEARING of foregoing case.

MAXWELL, J.

After the filing of the opinion in this case a motion for a rehearing was made which was sustained and the cause again argued and submitted to the court.

The action is brought to foreclose a deed absolute on its face, executed on the 22d of October, 1877, by John A. Smiley and wife to the plaintiff, for the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 3, T. 15, R. 13 E., in Douglas county. The defendants, Morton, Forbes, and Burley, claim to have purchased portions of said premises under judgments against Smiley. The court below found that the deed from Smiley and wife to the plaintiff was a mortgage; but sustained the claims of the other defendants to portions of the land in controversy. On the former hearing this court held that as the court below had found the instrument of conveyance to be a mortgage and not an absolute deed, that therefore there was no sale of the land by Smiley and wife, and it being their homestead, no authority for the defendants named to levy their executions on any portion of the land and sell the same. In other words that the findings of fact would not support the conclusions of law, and as the interests of said purchasers under the execution were separate and distinct from those of the plaintiff they should have appealed from that part of the decree. A careful re-examination of the records satisfies the writer that he was in error in this. The rule as to appeals appears to be this, that when the action is against several defendants who have distinct and separate defenses the judgment as to one defendant in a proper case may be appealed; in which case it will only be necessary to take up so much of the record as pertains to his case. Where, however, the interests of the parties are inseparably connected an appeal will take up the case as to all. *Glass v. Greathouse*, 20 Ohio, 503.

Hocking Valley Bank v. Walters, 1 Ohio St., 201. *Emerick v. Armstrong*, Id., 513. We are of the opinion that the interests of the parties in this case are so connected that the appeal by the plaintiff brought up the entire case. If a decree is rendered in favor of a party and he is satisfied with the relief granted, it certainly would be very unreasonable to require him to appeal to save his rights. But the law does not require him to do so, and he may rely upon his decree until it is questioned by the other side in some of the modes provided by law.

2. It appears from the record that Smiley had a prolonged contest to obtain a title to his land, which seems to have terminated in his favor about the year 1872. The taxes were unpaid on the land, and about the year 1875 it was purchased by one Bryant for a portion of the delinquent taxes due thereon. In January, 1877, Bryant obtained a tax deed for said premises.

The exact amount of such delinquent taxes and interest does not appear, but evidently was a very large sum. On the 22d of October, 1877, the plaintiff obtained a quit-claim deed from said Bryant for said premises, the expressed consideration being the sum of \$1,940. The plaintiff also paid the taxes on said land from October 22d, 1877, till about the time of the commencement of the suit, amounting to several hundred dollars. There was also a mortgage executed by Smiley and wife on said premises in 1874, to Patrick McHugh, upon which there was due October 22d, 1877, the sum of \$1,873. The plaintiff at or about the 22d of October, 1877, paid Patrick McHugh the amount of his mortgage, and to secure the payment of the same, together with the \$1,940 to redeem the land from tax sale, and other claims amounting in all to the sum of \$4,400.54, took a deed of conveyance of said premises from Smiley and wife, and executed and delivered to Mrs. Smiley an agreement to reconvey to her upon the payment of said amount with interest at any time within eighteen months,

and executed to Mr. Smiley a lease for the premises for one year. The deed and lease seem to have been recorded soon after their execution. The Smileys continued to reside on the premises, and it was their home.

Prior to the conveyance of the land in question by Smiley and wife to the plaintiff, Morton, Burley, and the Omaha National Bank had recovered judgments against John A. Smiley, which judgments were a lien upon the homestead, and under the statute in force when they became liens would become operative upon the abandonment of the homestead. *Bank v. Carson*, 4 Neb., 501. *Eaton v. Ryan*, 5 Id., 49. But until there was an actual abandonment there was no authority to enforce the judgment liens against the homestead. The execution of the deed from the debtor and his wife for the homestead and their removal from the premises *prima facie* would be sufficient to show such abandonment. But no such result necessarily follows from the execution of a deed for the homestead if the grantors remain in possession. The *purpose* for which the deed was made is open to inquiry, and if to secure a debt a court of equity will declare the deed a mortgage. The homestead law in force when a contract is made governs as to the remedy. *Dorrington v. Myers*, 11 Neb., 391. *De Witt v. Sewing Machine Co.*, *ante* p. 533. This rule, while it gave the judgment creditors a lien on the land, also protected the wife, and under the provisions of the homestead law of 1877 declared a conveyance of the homestead not executed by both husband and wife void. *Bonorden v. Kriz*, 13 Neb., 122. The deed from Smiley and wife to the plaintiff, being intended as a mortgage and not as an absolute conveyance, the husband alone by no act of his could, as against the wife, defeat that object. The lease, therefore, from the plaintiff to Smiley, of which the wife seems to have had no notice at the time of its execution, is, as against her, void.

Objection is made that the title to the land prior to the execution of the deed to the plaintiff was in the husband, and

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that the contract of the plaintiff to reconvey when the debt was paid was made with the wife, and cases are cited to show that by such a transfer the title passed out of the husband, and the property became that of the grantee. Under ordinary circumstances there is no doubt this position is correct, but under a homestead law that authorizes either husband or wife or both to claim the homestead it is not material in which the title may be. *McMahon v. Speilman*, 15 Neb., 653. Thus, in the case last cited, McMahon, after certain judgments had been recovered against him, conveyed his homestead to one Griffin, his wife joining in the deed. Griffin and wife immediately reconveyed to the wife of McMahon. There was no change in the possession of the premises and they continued to be occupied as a homestead for the family. The judgment creditors caused executions to be issued and levied on the homestead, upon the ground that the debtor (McMahon) had conveyed the premises; but this court held that as the premises had not ceased to be the family homestead that they were not liable to be sold upon the executions. The same rule applies in this case. The premises in question have never, so far as this record discloses, ceased for an instant to be the family homestead, and therefore were not liable to sale upon execution. The continued residence of Mrs. Smiley and family upon the premises was notice to every one that she possessed some interest there, and a person purchasing is bound at his peril to inquire as to the extent of that interest. *McKinzie v. Perrill*, 15 O: S., 168. *Uhl v. May*, 5 Neb., 157. A party who omits to make proper inquiry of the party in possession as to the extent of his title cannot be protected as an innocent purchaser against such interest. Upon the whole case it is apparent that the judgment heretofore rendered by this court is right and it is adhered to.

JUDGMENT ACCORDINGLY.

THE other judges concur.

WILLIAM M. FOSTER ET AL., APPELLANTS, V. HENRY
DOHLE ET AL., APPELLEES.

Mechanics' Lien: MATERIALS FURNISHED CONTRACTOR. Under the mechanics' lien law the lien of a material man for materials furnished for the erection of a building under an agreement with the contractor extends only to such materials as were used in or delivered at the building for use therein.

APPEAL from Douglas county. Heard below before
WAKELEY, J.

George B. Lake, John D. Howe, and Charles Ogden,
for appellants.

George W. Doane, for appellees.

MAXWELL, J.

The plaintiffs are lumber dealers in the city of Omaha, and bring this action against the defendants for certain material sold by them to one Winseit, a contractor, to be used in a building which he was erecting for the defendants. The jury made special findings, as follows: "That the quantity of lumber delivered by said plaintiffs for use in said building amounted to 25,714 feet, and was of the value of \$786.45. 2. That the quantity of lumber furnished by the said plaintiffs on the order of said Winseit for use in said building, and actually used therein, including that which was wasted and destroyed in the process of so using, amounted to 17,220 feet, and was of the value of \$546.45." The court below found that the plaintiffs were entitled to recover only for the actual amount of lumber furnished for and used in the building, including that which was wasted and destroyed, and rendered judgment in favor of the plaintiffs for the value of such lumber, deducting certain payments.

17	631
17	635
21	147
24	120
17	631
28	236
17	631
38	827
38	877

Section 1 of the mechanics' lien law is as follows, Comp. Stat., Ch. 54: "Any person who shall perform any labor, or furnish any material or machinery or fixtures for the erection, reparation, or removal of any house, mill, manufactory, or building, or appurtenances, by virtue of a contract or agreement, expressed or implied, with the owner thereof or his agents, shall have a lien to secure the payment of the same upon such house, mill, manufactory, building, or appurtenance, and the lot of land upon which the same shall stand."

Section 2 provides that, "Any person or subcontractor who shall perform any labor for, or furnish any material, or machinery, or fixtures for any of the purposes mentioned in the first section of this act, to the contractor, or any subcontractor, who shall desire to secure a lien upon any of the structures mentioned in said section, may file a sworn statement of the amount due him or them from such contractor or subcontractor for such labor or material, machinery, or fixtures, together with a description of the land upon which the same were done or used, within sixty days from the performing of such labor or furnishing such material, machinery, or fixtures, with the county clerk of the county wherein said land is situated, and if the contractor does not pay such person or subcontractor for the same, such subcontractor or person shall have a lien for the amount due for such labor, or material, machinery, and fixtures, on such lot or lots and the improvements thereon, from the same time and in the same manner as such original contractor, and the risk of all payments made to the original contractor shall be upon the owner till the expiration of the sixty days hereinbefore specified," etc. It will be seen that the statute provides that the owner of a building shall be liable:

1st. Upon contracts made by himself or his agent, in which case, in all probability, he is liable, and a lien may be had upon the structure for the entire amount of material

purchased for the building in pursuance of the contract, whether used in it or not. *Beckel v. Petticrew*, 6 O. S., 247. But that question is not before the court.

2d. Persons who perform labor, furnish material, machinery, etc., for a contractor or subcontractor. In such case the risk of all payments made to the contractor until the expiration of sixty days is upon the owner. This liability of the owner of a building which is being erected or repaired is not placed on the ground of a contract made with the owner by the person performing the labor or furnishing the material; because usually there is no such contract between them, and when there is, the right of the party to a lien is unquestioned; but upon the ground that as the labor or material contributed to the erection or repair of the building of which the owner receives the benefit, the law imposes upon him the responsibility, for sixty days at least, of seeing that the claims are paid. One of the objects of the legislature, no doubt, was to prevent collusion between the owner and contractor, and thus protect those who have furnished material or performed labor on the building from being defrauded. And so far as it may be necessary to carry this purpose into effect the law should be liberally construed. But it will not be seriously contended that the mere fact that the owner enters into a contract with the builder to erect or repair a building authorizes the builder to go to every lumber yard in the city and every hardware store and purchase from each a sufficient quantity of material for the erection or repair of the building in question, and make the owner of the building liable therefor. If all this material was delivered by the material men at the building, and they acted in entire good faith, it is possible the owner might be liable, because the delivery of the material would be notice to him of the unusual quantity which was being furnished for which he might be liable. But that question is not before the court. The contractor, however, unless expressly constituted such,

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is not the agent of the builder, and cannot bind him by contracts for materials not put into the building or delivered at the same for use therein. As there is nothing to show that any of the material not allowed by the court below was delivered at or used in the building the owner thereof is not liable for the same. The judgment of the district court is therefore affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

COBB, CH. J., dissents.

17 634
21 147
24 191
17 634
28 837

EDWARD MARRENER AND GEORGE T. KIMBALL, APPELLANTS, v. WILLIAM A. PAXTON, APPELLEE.

Mechanics' Lien: MATERIALS FURNISHED BY SUB-CONTRACTOR. A subcontractor who furnishes materials for a building, but whose contract was made with the contractor alone, can acquire a lien under the mechanics' lien law for such materials only as were delivered at the building for use therein, or were actually used in the construction thereof.

APPEAL from Douglas county. Tried below before WAKELEY, J.

George B. Lake, John D. Howe, and Charles Ogden, for appellants.

Congdon, Clarkson & Hunt, for appellee.

MAXWELL, J.

In April, 1882, the defendant entered into a contract with R. C. Steele & Johnson, of Omaha, to furnish the

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glass for a warehouse he was then erecting in Omaha. Those parties not having the glass themselves, sent the order to the plaintiffs, who were dealers in glass in Chicago. The order was filled on the 8d of May, 1882. The glass seems to have been directed to Steele and Johnson, Omaha, and was received by them on or about the 11th of May of that year. On the 16th of that month said firm executed a chattel mortgage to the First National Bank of Omaha, as stated by the junior member of the firm in his testimony, "on all the goods and chattels of said firm. The mortgage among other things covered about fourteen hundred boxes of window glass, in which were the four cases or boxes of plate glass and the forty boxes of double thick French glass which are included and mentioned in exhibit A." (That purchased for the defendant.) Soon afterwards the bank foreclosed the mortgage. Mr. Marrener, one of the plaintiffs, was present at the sale and bid \$1,000 for the glass which his firm had furnished to Steele and Johnson for the defendant. Afterwards the plaintiffs filed an account against Paxton for the value of the glass, and claimed a mechanic's lien as subcontractors upon the defendant's building and the lots on which it stands. The court below found the issues in favor of the defendant and dismissed the action. The only objection is that the finding is against the weight of evidence.

The question here involved is substantially the same as in *Foster v. Dohle*, ante p. 631. We have no doubt that in a proper case, one furnishing materials in good faith for the erection of a building under an agreement with a contractor for that purpose, may file a mechanic's lien upon the structure and the lots on which it stands. The lien is given, however, not upon the ground that a contract was made by the owner with such subcontractor, but because the material so furnished was used in the erection of the building. The furnishing of the material is notice to the owner of the rights of the party, and until the

Marrener v. Paxton.

time for filing a lien has expired, he is directly liable to such party for the value of the same. Where, however, a subcontractor seeks to charge the owner, it devolves on him to show either that the material furnished by him was used in the erection of the building, or at least that he delivered it there under an agreement with the contractor that it would be used in the erection of the building on which the lien is sought. In this case the weight of testimony shows that the credit was given to R. C. Steele and Johnson, and they regarded themselves as owners of the property by executing a mortgage thereon to the bank. The plaintiffs also recognized the validity of the mortgage and the transfer of the title of the property by bidding at the sale on the foreclosure of the mortgage. The defendant was the highest bidder, having paid more than \$1,200 for the property, and as he appears to have acted in good faith he should not be required to pay for the glass again. There is no doubt from the evidence that the plaintiffs sold the property in question to Steele and Johnson, and the testimony tends to show other extensive dealings with that firm. They should be paid for property sold by them, but the court cannot aid them in this proceeding. The judgment is clearly right and must be affirmed.

JUDGMENT AFFIRMED.

REESE, J., concurs.

COBB, CH. J., dissents.

SAMUEL K. HAINES, APPELLANT, v. ANDREW J. SPAN-
OGLE ET AL., APPELLEES.

Specific Performance. A verbal contract for the sale of real estate which is clearly established, and under which possession of the premises has been taken and acts of part performance done, will be specifically enforced.

APPEAL from the district court of Hamilton county.
Heard below before NORVAL, J.

J. H. Smith, for appellant.

Hainer & Kellogg, for appellees.

MAXWELL, J.

This is an action to enforce the specific performance of a verbal contract for the west half of the south-east quarter of section twenty-three, in township ten north, range eight west, in Hamilton county. On the trial of the cause in the court below the issues were found in favor of the defendants, and the action dismissed. The plaintiff appeals.

It appears from the testimony that the parties were formerly residents of Pennsylvania; that about the year 1876 one or both of the defendants visited this state, and both removed here in 1879. The plaintiff seems to have been in the employment of one or both of the defendants, and came with them in charge of their horses. Prior to removing to this state the defendants seem to have promised the plaintiff to aid him in procuring a piece of land. The defendants purchased a tract of land of the Union Pacific Railway Company at \$4 per acre, and apparently in pursuance of their promise to the plaintiff agreed to let him have the land above described at \$5 that being the price they considered land of that kind to be worth.

There seems to have been a dispute between the parties as to the price, the plaintiff insisting that he was to have the land at cost price (\$4 per acre), while the defendants contended that \$5 per acre was the average cost price of that quality of land. The plaintiff afterwards assented to the price asked. In the year 1880 or 1881 the plaintiff broke up, as he testifies, about twenty acres of the land in question, and so far as appears had the exclusive possession. In the fall of 1881 one of the defendants presented a contract to him to sign which the plaintiff afterwards returned without signing, the principal objection to it being the clause providing for forfeiture in case of default. The plaintiff continued in possession cultivating the land until and including the year 1883. On the 2d of April, 1883, the defendant, Samuel Spanogle, presented a mortgage upon the land in question, duly prepared for the plaintiff and his wife to sign and acknowledge, and return to him. This mortgage was to secure a note for \$75 to be given by the plaintiff to the defendants, due on the 1st of December, 1883, with interest at ten per cent; one note for \$75 with interest at ten per cent due on the 1st day of July, 1884; and one note for \$72 due on or before January 1st, 1885, with interest at ten per cent. These notes and the mortgage were all dated by Samuel Spanogle April 2, 1883, and drew interest from that date. The plaintiff testifies that when Spanogle presented the notes and mortgage to him to execute that he, Spanogle, said he, the plaintiff, could execute the notes and mortgage and return them to the defendants "any time whenever it suited me," and all the testimony shows that no definite time was fixed. On the 2d of April, 1883, the plaintiff and defendant Samuel Spanogle had a settlement, and it was found there was due from the defendants to the plaintiff the sum of \$50.35 with which he was credited as the first payment. Of this sum \$45 was *interest* upon *monthly balances* due the plaintiff from the defendants for labor

Haines v. Spanogle.

performed by him for them, showing that he must have been in their service for a long time. And we infer from reading the testimony that a very friendly feeling existed between the parties until this difficulty occurred, and a desire on the part of the defendants to aid the plaintiff in procuring a home. In such cases there is liable to be more laxity in making the contract, and perhaps in its enforcement, because each party trusts more or less to the sense of honor of the other. In this case this is shown in the delay in making the deed, notes, and mortgage, and which, under all the circumstances, is not unreasonable. The plaintiff executed the notes and mortgage early in July, 1883, but did not tender them to the defendants till the 30th of that month, when they refused to receive them, claiming that the contract was canceled. It is claimed, too, that the defendant, A. J. Spanogle did not make the contract or give his assent to it. The testimony, however, tends to show that himself and brother Samuel held this land as partners; that Samuel Spanogle was the partner who made sales, and this, too, in some cases without consulting his brother. The testimony also shows not only this knowledge of A. J., but that he assisted in making the contract. The plaintiff testifies on cross-examination: "I spoke to A. J. some time in the spring."

Q. What was the conversation with A. J. Spanogle?

A. It was in regard to the price, and whether or not he would give me a chance to pay for the land, and if I was not able to make the payments they were to carry it along for me. He told me whatever Sam and I agreed upon was satisfactory to him.

Q. You and A. J. agreed on the thing satisfactorily, did you?

A. Five dollars per acre was what we arrived at, and I was to go and fix it up with Sam.

Q. He told you to go to Sam and fix it up, did he?

A. Yes, sir.

This is not denied by Mr. A. J. Spanogle. He testifies: "He (the plaintiff) asked me what we were going to charge him for this land, and I asked him if \$5 per acre was too much, and he said it was. That I replied in this way, that \$5 was not too much when we considered the average price of the land, and that it ought to be that much the way we paid for it; and he did not say whether he was going to take it, and I did not say he should have it. It was simply a conversation in regard to the value of it in case he took it."

Q. Did he ever agree with you to take the land?

A. No, sir, there was no bargain about it.

This conversation took place in the spring of 1880 or 1881. His testimony also tends to show a number of conversations with the plaintiff, running through a series of years, wherein he expressed a desire to aid him in procuring a piece of land. There is certainly sufficient evidence in the record to show the assent of the defendant to the contract. Time is not of the essence of the contract in this case, neither from the contract itself, nor from the circumstances connected with it. The mortgage and notes delivered on the 30th of July, 1883, were dated and drew interest from April 2d of that year, so that the defendants could not suffer loss on that account. The remaining consideration was a mortgage given on the land in question by the defendants, which the plaintiff was to assume. The defendants, therefore, in no manner or form suffered by the delay, while the testimony shows that the land itself, the security, increased in value 50 per cent during the spring of 1883. Upon the whole case, we are of the opinion that a clear and definite verbal contract for the sale of the land in controversy is established both by the pleadings and proof; and that such acts of part performance thereunder have been done by the plaintiff as to entitle him to a decree. The decree of the district court is therefore reversed; and as the entire considera-

Hogan v. O'Niel.

tion secured by the mortgage is now due, the plaintiff, within sixty days from this date, is required to pay to the clerk of this court for the use of the defendants the sum of \$212, with interest at 10 per cent from the 2d day of April, 1883, and within ten days thereafter the defendant shall execute a good and sufficient deed to the plaintiff for said land, subject, however, to the mortgage set forth in the contract, and in case of their failure to execute and deliver deed aforesaid within ten days from the payment of the consideration, the clerk of this court is hereby appointed a special commissioner to execute a deed to the plaintiff in the names of the defendants for said premises.

A decree will be entered in conformity to this opinion.

DECREE ACCORDINGLY.

THE other judges concur.

PATRICK HOGAN, PLAINTIFF IN ERROR, V. PATRICK
O'NIEL, DEFENDANT IN ERROR.

1. **Bill of Exceptions.** Where the original bill of exceptions in a cause tried in the district court is intended to be used in the supreme court, the clerk of the district court must attach his certificate to the same that it is the original bill. *Aultman v. Patterson*, 14 Neb., 57.
2. ———: **PRACTICE.** The objection to such bill may be taken either by motion to quash the exceptions or on the final hearing. *Mewis v. Johnson*, 5 Neb., 217.

ERROR to the district court for Dakota county. Tried below before BARNES, J.

Gantt & Norris, for plaintiff in error.

Isaac Powers, Jr., for defendant in error.

17	641
28	650
17	641
43	19
17	641
47	199
47	398
17	641
49	273

REESE, J.

The defendant in error insists that what purports to be the bill of exceptions in this case is not authenticated as required by law, and cannot therefore be received as such over his objection.

In *Mewis v. Johnson*, 5 Neb., 217, Chief Justice LAKE, in delivering the opinion of the court upon the question of practice in the supreme court, says: "The correct practice undoubtedly is either to raise this question (as to the sufficiency of the bill of exceptions) by a motion to quash the bill of exceptions, or, on the final trial, by a suggestion to the court that it was not allowed within the time limited by the statute (the question in that case), and therefore not properly a part of the record of the case."

In the case at bar an inspection of the record shows that the bill of exceptions was presented to the counsel for defendant in error, and also signed by the judge who heard the cause within the time required by law, but it nowhere appears that the bill of exceptions is the original bill of exceptions in the case. Section 587 of the civil code provides that, "where the original bill of exceptions, or testimony in equity cases, is so as aforesaid made a part of a transcript or record for the supreme court, the clerk shall state such fact in his certificate thereto, and omit to certify that the same have been copied into such record or transcript."

While the bill of exceptions attached to the transcript in this case purports to be the original, yet there is no certificate by the clerk that it is the original bill. The clerk's certificate to the transcript of the pleadings and proceedings contains the statement that the transcript is correct, "excepting the bill of exceptions, which is not made a part of this transcript." This leaves the bill of exceptions wholly unauthenticated.

This question was before the court in *Aultman v. Pat-*

State v. York County.

tersen, 14 Neb., 57, in which it was held that the requirements of the statute could not be dispensed with.

It follows that the bill of exceptions attached to the transcript cannot be considered.

Upon the trial in the district court, the court, upon motion of the defendant in error, instructed the jury as follows: "Under the evidence and law in this case, the defendant is entitled to recover, and you will find a verdict accordingly." This was the only instruction given. No objection was made and no exceptions taken to the same. The motion for a new trial, filed in the district court, presents no questions other than alleged errors occurring upon the trial, and no question is presented which can be considered without the aid of a bill of exceptions. It therefore follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. MORGAN, McCLELLAND, AND DAYTON, V. THE COUNTY BOARD OF YORK COUNTY.

Mandamus. The application for mandamus examined, and *Held*,
Not sufficient to warrant the issuance of a writ.

ORIGINAL application for mandamus.

George B. France, for relator.

Scott & Gilbert, for respondents.

REESE, J.

This is an application to this court, in the exercise of its original jurisdiction, for a writ of mandamus to compel

the board of supervisors of York county to award to the relators the contract for furnishing the county officers with blanks and stationery for the year 1885, alleging that they are the lowest bidders therefor. The defendants demur to the petition of relators upon the ground that it does not state facts sufficient to constitute a cause of action.

Among other things the relators allege that on or before the 1st day of December, 1884, the county clerk of said county prepared separate estimates of the books and blanks and stationery required for the use of the officers of the county during the year 1885, and during the month of December published a brief advertisement, stating therein the probable gross number of each item required, and invited bids therefor. That the relators filed bids with the clerk, by which they offered to furnish the several articles of supplies as stated in their bids for the prices named therein. That one L. D. Woodruff filed bids with the clerk, by which he offered to furnish the supplies described in the notice for certain prices set out in the bids.

By comparing the bids of relators with the estimates of the clerk, we find that the clerk called for bids for furnishing, among other things, 9,000 XXX printed envelopes, 6 and 10 inches in size. The relators offer to furnish XX envelopes of the required size, and say "the heaviest made in those sizes is XX." There is no allegation in the petition that this is the case.

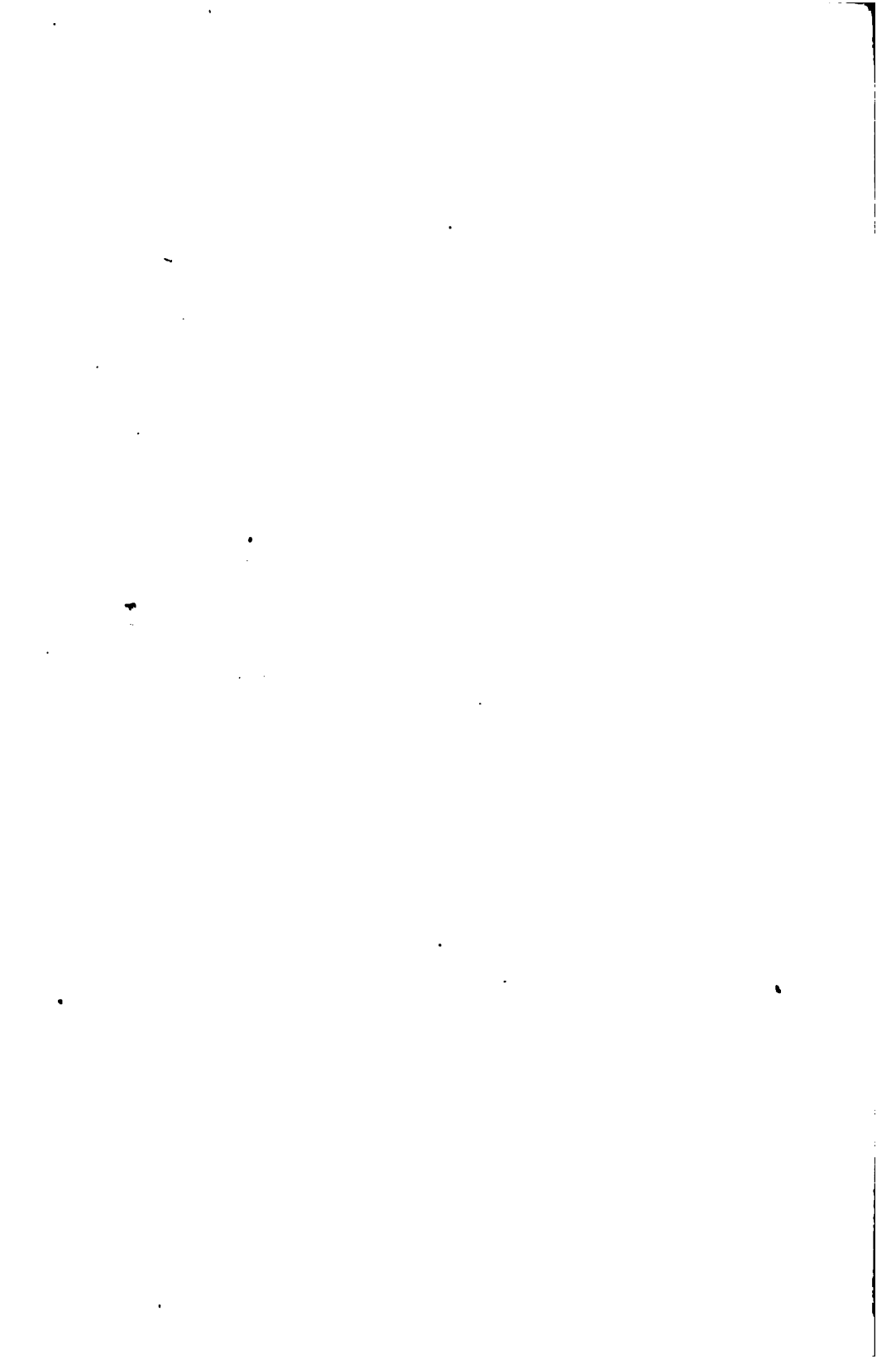
The clerk advertised for bids for "4 bundles legal cap paper, 16 lb. numbered," for the office of the county clerk, "1 bundle legal cap paper, 16 lb.," for the office of superintendent, and "20 bundles legal cap" for the office of the clerk of the district court. In the bid of relators no offer is made to furnish the "numbered" legal cap paper, nor is any bid made for furnishing "bundles" of such paper. But they say: "We are in doubt what the bundles of legal cap called for means, but will furnish 16 lb. Rhd. legal cap per ream, 5.75."

In the estimate of the clerk as published, an item occurs in the call for bids to supply the office of the clerk of the district court as follows: "2,000 blanks of all kinds." In relator's bid, which was submitted to respondents, they say: "It is impossible to bid honestly on the 2,000 blanks advertised for the district clerk's office. Will furnish the same class. Blanks for district clerk's office are not specified." The clerk's estimate calls for bids for 1,000 blanks for "accounts against the county" for the office of the county clerk; also, for "fifty document envelopes, 1 inch." The relators' bid fails to include these things, and the petition contains no allegation of the existence of any facts which would excuse their omission. Therefore the petition does not make out a case which, if true, would warrant the court in issuing a mandamus.

The demurrer is sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NEBRASKA.

JULY TERM, 1885.

17	647
18	512
19	484
17	647
20	550
17	647
47	576

PRESENT:

HON. AMASA COBB, CHIEF JUSTICE.
 " SAMUEL MAXWELL, } JUDGES.
 " M. B. REESE, }

THE STATE OF NEBRASKA, EX REL. FRANK W. MATTOON, v. REPUBLICAN VALLEY RAILROAD CO.

1. **Railroads: DELIVERY OF GOODS.** The common law rule requiring common carriers, by land, to make personal delivery to the consignee, has been so far relaxed as regards railways, *from necessity*, as in most cases to substitute in place of personal delivery a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. *Vincent v. The Chicago and Alton Railroad Co.*, 49 Ill., 33.
2. ———: **WAREHOUSES AND DEPOTS MUST BE MAINTAINED.** In consequence of such relaxation, and in consideration thereof, the correlative duty devolves upon railways as common carriers to furnish and maintain suitable warehouses or depots at all appropriate points on their lines for the receipt and discharge of passengers and freight.
3. ———: **UNJUST DISCRIMINATION.** The right to build and operate a railroad, and to charge and take tolls and fares, is a prerogative granted by the state. Public utility is the considera-

tion for such grant. Although in the hands of a private corporation it is still a sovereign franchise, and must be used and treated as such, it must be held in trust for the general good. In the use of such franchise all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike, without unjust discrimination against any.

4. ———: ———: MANDAMUS. The duty thus imposed growing out of and resting upon the principles of the common law, may be enforced in the absence of statutory requirements.

ORIGINAL application for mandamus.

Burke & Prout, for relators.

I. Railroad corporations have their existence in this and other states only by virtue of an act of the legislature. These corporations are not created for the personal aggrandizement of the corporators, it is only upon the theory that their works will be of benefit to the people at large that their chartered rights are given them. Special powers and privileges are granted to railroad corporations by the state as a portion of sovereignty, such as the exercise of the right of eminent domain. The duty of government to establish and maintain highways, to facilitate public travel and transportation at public expense, has been recognized and discharged by all civilized governments from the earliest times. In the progress of events it was found that this function of government could with safety and convenience be entrusted to private individuals associated together under grant from government, the corporation giving the public the right to use the highway built by it in consideration of the franchise received. Among the instrumentalities to which have been delegated this function of government, railroads stand pre-eminent. Indeed they have come to be a public necessity, open to the public use without discrimination. The corporation upon payment of fare is under the same obligation to render the required service for the public that the state would be if railroads

were free and conducted by state authority. Nor does the ownership of railroads, whether it be in the state or a private corporation, affect the nature of their use, since in either case the functions to be exercised and the use to be subserved are public. While the law affords railroad corporations adequate and complete protection in the exercise of their chartered rights, it holds them to a strict performance of the public duties enjoined upon them, as a consideration for the rights and powers thus granted.

Railroad charters are contracts made by the legislature in behalf of every person interested in anything to be done under them. In consideration of this franchise they receive from the state, railroad corporations agree to perform certain duties toward the public. Being creatures of the law, they are entrusted with the exercise of sovereign powers to subserve public necessities and uses; and are bound to conduct their affairs in furtherance of the public objects of their creation. The duties enjoined upon the corporation are ministerial duties, to do and perform what the public convenience and necessity reasonably require. Railroads are public highways. *Const.*, Art. 11, § 4. 2 *Potter on Cor.*, §§ 471-478, and cases cited. *Railroad Com. v. P. & O. C. R. R.*, 63 Me., 280. *McDuffee v. R. R. Co.*, 52 N. H., 447. *Commonwealth v. Eastern R. R. Co.*, 103 Mass., 258. *State of Conn. v. New Haven & Northampton Co.*, 87 Ct., 153. *Id.*, 43 Ct., 353. *State of Conn. v. The Hartford & New Haven R. R. Co.*, 29 Ct., 538. *Rogers L. & M. Works v. Erie R. R. Co.*, 20 N. J. Eq., 385. *P. & R. I. R. R. v. Mining Co.*, 12 Am. L. R. (N. S.), 272. *People v. N. Y. & H. R. R. R. Co.*, 9 Eng. and Am. R. R. cases, 1. *Sanford v. R. R. Co.*, 24 Pa. St., 381. *McCoy v. C. I. St. L. & C. R. R.*, 13 Fed. Rept., 3. *Munn v. Illinois*, 94 U. S., 113. *Messenger et al. v. Pa. R. R. Co.*, 36 N. J. L., 407. *Id.*, 37 N. J. L., 531. *Leavenworth Co. v. Miller*, 7 Kans., 479. *C. & N. W. R. R. Co. v. People*, 56 Ill., 867. *Hallenbeck v. Hand*, 2 Neb., 411. *The*

State v. S. C. & P. R. R. Co., 7 Neb., 857. *The State, ex rel. Webster, v. Neb. Telephone Co.*, 22 N. W. R., 237.

II. The power of determining what the duties are that are owed by a railroad company to the public, as well as the enforcement of their performance, is vested in the appropriate tribunals of the state. It is not within the discretion of the directors ultimately to determine what these public ministerial duties are, or the manner in which they are to be performed. To hold so would be to concede to the directors the power to promote the private interests of the corporation by subverting the public objects to be subserved by the charter. The power, both of determination and enforcement, is necessarily vested in the courts. *Railroad Com. v. P. & O. C. R. R. Co.*, 63 Me., 280. 2 Potter on Cor., § 476. *The State, ex rel. Webster, v. Neb. Telephone Co.*, 22 N. W. R., 237. *Munn v. Illinois*, 94 U. S., 113. *Commonwealth v. Easton R. R. Co.*, 103 Mass., 258. *State v. Hartford & N. H. R. R. Co.*, 37 Ct., 153. *B. & M. L. v. Brooks*, 60 Me., 569. *State v. The H. & N. H. R. R. Co.*, 29 Ct., 538. *State v. N. H. & Northampton Co.*, 48 Ct., 353. *Allen v. Joy*, 60 Me., 124. *People v. N. Y. & H. R. R. R. Co.*, 9 Eng. and Am. R. R. cases, 1. *McCoy v. C. I. St. L. & C. R. R.*, 13 Fed. R., 3. *C. & N. W. R. R. Co. v. People*, 56 Ill., 367.

III. Railroad companies in accepting their franchises accept them with all the advantages and disadvantages incident thereto. They know, or should know, before undertaking their work, all that they will be obliged to contend with, and the probable expense to be incurred, and they can not, after having assumed their part of the contract made with the state, abandon or refuse to perform any part of the duty they owe to the public. *R. R. Com. v. P. & O. C. R. R. Co.*, 63 Me., 269. *C. & R. I. R. Co. v. Mining Co.*, 12 Am. L. J. (U.S.), 282. *C. & N. W. R. R. Co. v. The People*, 56 Ill., 876. 1 Redfield on Railways, 683, § 8. *Id.*, § 6 and cases cited. *The People, ex*

rel., v. *N. Y. & H. R. R. R. Co.*, 9 Eng. & Am. R. R. cases, 1. *State v. S. C. & P. R. R.*, 7 Neb., 374. *State v. N. H. & Northampton Co.*, 87 Ct., 153. *Atty. Gen. v. Erie & K. R. Co.*, 20 N. W. Rept., 730.

IV. The withholding of such facilities from Blue Springs which are given to all other places on respondent's road is an illegal discrimination. Comp. Stat., 385, Art. V., §§ 1-4. *C. & N. W. Ry. Co. v. People*, 56 Ill., 365. *Sanford v. Railroad Co.*, 24 Penn., 382. *Rogers L. & M. Works v. Erie R. R. Co.*, 20 N. J. Eq., 385. *Messenger et al. v. Pa. R. R. Co.*, 7 Vroom., 410. *Boxendale v. G. W. Ry. Co.*, 5 C. B. (N. S.), 309. *Vincent v. C. & A.*, 49 Ill., 83. *Sanford v. R. R. Co.*, 24 Pa. St., 381. *N. Eng. Exp. Co. v. Me. Cent. R. Co.*, 57 Me., 188. *McDuffee v. R. R. Co.*, 52 N. H., 430. *Cambliss v. R. & R. R. R. Co.*, 4 Brews., 613. *Railroad Com. v. P. & O. C. R. R.*, 63 Me., 280. *Hays v. Pa. Co.*, 12 Fed. Rept., 309. *P. & R. I. R. R. v. Mining Co.*, 12 Am. L. R. (N. S.), 272. *State, ex rel. Webster, v. Neb. Telephone Co.*, 22 N. W. Rep., 237.

V. That it is a duty owed by railroad companies to the public to stop their trains, establish depots, furnish side tracks, etc., for the proper transaction of business, at all places upon their road and as frequently as will furnish reasonable accommodation to the public, is not only shown by the very nature of their office as common carriers, and by the declaratory words of our constitution making them public highways and declaring that "their liability as common carriers shall not be limited," but is it not also clearly expressed by an act of our legislature? Comp. Statutes, Ch. 16, § 121.

Is the language of this statute to be misunderstood when it says railroad corporations "shall furnish sufficient accommodations for the transportation of passengers and freight," or can there be any mistake as to the meaning of the words, "shall take, transport, and discharge all passen-

gers to and from * * * all places * * * upon their said road?"

Is not the language of this section of our statutes abundantly comprehensive to cover the case at bar, and if enforced will it not give the relief asked for?

Marquett & Deweese, for respondent.

1. Railroad has a right to establish its depots and stations, and has the right to determine where they shall be. Comp. Stat., Ch. 16, §§ 81, 121. *A., T. & S. F. R. R. v. Denver*, 110 U. S., 667.

2. The question is a legislative one, not judicial, as to whether the company should establish a depot at Blue Springs or not. Cases cited *supra*. *Commonwealth v. Eastern R. R.*, 103 Mass., 258. *State v. New Haven R. R.*, 43 Conn., 353.

3. Authorities cited by relator have reference to where a railroad company abandoned a portion of the line or abandoned a depot once established.

4. The court has no jurisdiction. *Hall v. Chesapeake R. R.*, 12 Amer. & Eng. R. R. Cases, 41. 1 Rorer on Railroads, 20. *Blanchard v. R. R. Company*, 31 Mich., 43. *Marble v. Ripley*, 10 Wall., 339. *Bagley v. Railroad*, 2 Phila., 44.

COBB, CH. J.

This is an original application to this court for a writ of mandamus requiring the respondent, the Republican Valley Railroad Company, to build within the corporate limits of the city of Blue Springs a depot, and to lay down the necessary side tracks and switches, and to stop its trains thereat for the proper transaction of business. The relator alleges that that part of respondent's railroad which runs from Beatrice in a south-easterly direction to a point in section 29, township 2, range 7 east, where it intersects the

respondent's main, or east and west, line, was built in the years 1880-1; that it was built and runs through the said city of Blue Springs; that at the time of the construction of said railroad Blue Springs was a village of one thousand inhabitants; that it contained five stores carrying general stocks of merchandise, two stores carrying stocks of hardware, two lumber yards, four implement houses, one pump and wind-mill house, three blacksmith shops, three drug stores, two hotels, two livery stables, two harness shops, two barber shops, two restaurants, two millinery shops, two printing offices, three land agents, one bank, with an average deposit of \$50,000, two coal dealers, two butcher shops, one auction house, two saloons, one bakery, one jewelry store, three wagon shops, eight contractors and builders, two stock buyers, one grain dealer, one grist mill, one plow factory, one school with three departments, with a proportionate number of ministers, lawyers, and doctors.

The relator also alleges that at the time of filing the said relation, the said Blue Springs was a city of the second class of over fifteen hundred inhabitants, with a thickly settled country contiguous thereto, and to and from which large numbers of people desired to be carried by the respondent company, and to and from which large amounts of freight, produce, stock, and merchandise are annually consigned by way of the respondent's line of road; but that the respondent has neglected, failed, and refused to establish or erect any depot or station house at said Blue Springs, or to stop all or any of its trains thereat for the receipt or discharge of either passengers or freight upon or from its said railroad.

The relator further alleges that he is engaged in the business of buying grain and selling agricultural implements and farm machinery at said Blue Springs, and that in the carrying on of his said business he has large amounts of grain to ship from said point, annually, and has consigned to him large quantities of freight; that by the refusal of

the respondent to receive and discharge said freight at said Blue Springs, he is prevented from enjoying the same privileges and accommodations over the defendant's line of road as are merchants at other points on said line of railroad, etc. There are other allegations in said relation which it is not deemed necessary to notice in order to an understanding of the points decided by the court.

The respondent by its answer denies that it built its line of railroad through the village of Blue Springs, and alleges that said line of road, as located and built, was a distance from the corporate limits of said village of 988 $\frac{5}{8}$ feet, and that the depot built at Wymore is only 5,479 $\frac{1}{2}$ feet from the corporate limits of said village of Blue Springs; denies that there is any necessity for the location of a depot building nearer to Blue Springs than the location at Wymore, and alleges that it is impracticable for respondent to have and operate its line with a depot at both places, etc. Also that the Omaha & Republican Valley Railroad runs through Blue Springs and has established a depot there for the accommodation of the public, "and that they have no depot at Wymore." And also that the city of Wymore has now inhabitants, and is far more important as a commercial point than Blue Springs, having and doing a great deal more business than Blue Springs.

A considerable part of the respondent's answer, as well as of its evidence, is directed to the point of the impracticability for topographical and engineering reasons of running its main or east and west line through Blue Springs. That proposition is not controverted or denied by the relator, nor do I see its relevancy to the case as presented by the relation. It may be admitted that so far as the main line is concerned, the respondent owes no duty to the relator.

So far then as the case is presented by the pleadings, it involves these two questions:

- 1, Is the depot of respondent at Wymore sufficiently near to the business portion of Blue Springs as to afford

her inhabitants and merchants, and particularly the relator, all the facilities and accommodations which the respondent owes them as a common carrier, one of whose lines runs through the last named city, without discrimination against the business and inhabitants thereof? If not, 2, Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular services thereat, both at Wymore and Blue Springs?

The more important and *quasi* public question of the power of the courts in the absence of legislation to compel the respondent to establish and maintain a depot at Blue Springs, is raised by respondent in its brief, and that question will be first considered.

Relator in his brief contends that the legislature of the state has imposed upon the respondent the duty of furnishing side tracks and depots, and stopping its trains for the receipt and discharge of passengers and freight, and the proper transaction of business at all places upon their road, etc., and he cites section 121, of chapter 16, Comp. Stat., in support of that proposition. The section reads as follows: "Sec. 121. Every such railroad corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of passengers and freight, and shall take, transport, and discharge all passengers to and from such stations as the trains stop at, from or to all places and stations upon their said road, on the due payment of fare or freight bill."

I do not think that this section furnishes authority for the interference of the courts to compel the establishment of a depot or station at any point on the line of respondent's road, but on the contrary, it is quite apparent upon the face of the section that every duty thereby imposed is qualified by the words, "to and from such stations as the trains stop at," and its application limited to established depots.

But in the opinion of this court it has authority to grant

relief in cases such as that presented in this case, yet for the source of its authority it must look to the principles of the common law rather than to legislative enactments. The respondent is a common carrier of persons and merchandise. At common law it was the duty of a common carrier by land to deliver freight personally to the consignee; but when railways took the place of conveyances drawn by animals, necessity required the relaxation of this rule so as to allow of the substitution in place of personal delivery a delivery at the warehouse or depot provided by the companies for the storage of goods. *Vincent et al. v. C. & A. R. R. Co.*, 49 Ill., 33. Is it too much to say that this relaxation of the above rule in favor of railway companies as common carriers imposed upon them the duty of providing suitable depots for the purpose of such delivery? This duty is so intimately connected with the business for which railways are built and managed that motives of self-interest almost always secure its observance. But when for any reason it is neglected or refused, may it not be enforced the same as any other public duty?

In the leading case of *Munn v. Illinois*, 94 U. S., 113 in the opinion, C. J. Waite, after showing by elaborate reasoning and the citation of authorities that "when private property is devoted to public use it is subject to public regulations," etc., says: "It is insisted, however, that the owner of property is entitled to a reasonable compensation for its use, even though it be clothed with a public interest, and that what is reasonable is a judicial and not a legislative question. As has already been shown, the practice is otherwise. In countries where the common law prevails, it has been customary from time immemorial for the legislature to declare what shall be a reasonable compensation under such circumstances; or, perhaps more properly speaking, to fix a maximum beyond which any charge made would be unreasonable. Undoubtedly, in mere private contracts relating to matters in which the public has no interest, what

is reasonable must be ascertained judicially. But this is because the legislature has no control over such a contract. So, too, in matters which do affect the public interest, and as to which legislative control may be exercised; if there are no statutory regulations upon the subject, the courts must determine what is reasonable. The controlling fact is the power to regulate at all. If that exists, the right to establish the maximum of charge as one of the means of regulation is implied. In fact, the common law rule, which requires the charge to be reasonable, is itself a regulation as to price. * * * Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

The question before that court was, whether the legislature of Illinois, under the limitations upon the legislative power of the state imposed by the constitution of the United States, had the power to fix by law the maximum of charges for the storage of grain in warehouses at Chicago, etc. And the object of the opinion is to uphold the legislature in the exercise of such power. But I think it equally sustains the proposition that, in the absence of all legislation, the abuse of overcharging by such warehousemen could be restrained and regulated by the courts; and that the same power extends to any other abuse in the management of property which has been impressed with a public interest, and which, by reason of its public use, has ceased to be *juris privati* only, as well as to that of fixing a maximum charge for its use.

This question can scarcely be said to be a new one in this court. In the case of *The State, ex rel. Webster, v. Nebraska Telephone Co.*, ante p. 126, this court issued a

peremptory mandamus, compelling the respondent to place and maintain in the office of the relator a telephone and transmitter, such as are usually furnished to its subscribers. In the opinion by Judge REESE, he says: "Similar questions have arisen in, and have been frequently discussed and decided by, the courts, and no statute has been deemed necessary to aid the courts in holding that when a person or company undertake to supply a demand which is 'affected with a public interest,' it must supply all alike who are alike situated, and not discriminate in favor of nor against any." As a question of power, I fail to see any ground for distinguishing between that which compels a telephone company to furnish a separate instrument for the accommodation of one customer, and that which would compel a railroad company to make stoppage of its trains and furnish depot accommodations to a whole community. In neither case would any court interfere except where it is made to appear that such interference is necessary to prevent an unjust discrimination, or an abuse of that discretion which must be conceded to reside in all private corporations in respect to their dealings with the public.

The record in this case does not present the question of the power of the state to impose new duties upon railroad companies, or to take away or limit their powers by appropriate legislation. Nor does it present the question of the power of the courts to enforce the performance of every duty enjoined upon such corporations, either by the acts under which they derive their corporate existence or other legislation. If either of these questions were presented there would be abundant authority for their decision in the works and cases cited by counsel. But upon the precise point of the power of the court to enforce the discharge of a duty by the railroad company not specially enjoined upon it by the terms of its charter, nor any provision of statutory law, which, as above stated, I conceive to be the turning point in this case, there is but very little.

There are many opinions of courts and *dicta* in cases cited by counsel wherein the assumed right of railway corporations to discriminate between shippers and others is discussed, deprecated, and denied. Such discrimination is in but few cases upheld, and then only when such discrimination is shown not to be unjust to the complaining party. The remarks of Chief Justice Beasley, of the supreme court of New Jersey, in the case of *Messenger v. Pennsylvania R. R. Co.*, 36 N. J. L., 407, are so entirely in accord with the views of this court that I deem it not out of place to transcribe them here. "A company of this kind is invested with important prerogative franchises, among which are the rights to build and use a railway, and to charge and take tolls and fares. These prerogatives are grants from the government, and public utility is the consideration for them. Although in the hands of a private corporation they are still sovereign franchises, and must be used and treated as such, they must be held in trust for the general good. If they had remained under the control of the state, it could not be pretended that in the exercise of them it would have been legitimate to favor one citizen at the expense of another. If a state should build and operate a railroad, the exclusion of everything like favoritism with respect to its use would seem to be an obligation that could not be disregarded, without violating natural equity and fundamental principles. And it seems to me impossible to concede that when such rights as these are handed over on public considerations to a company of individuals, such rights lose their essential characteristics. I think they are unalterably parts of the supreme authority, and in whatsoever hands they may be found they must be considered as such. In the use of such franchises all citizens have an equal interest and equal rights, and all must, under the same circumstances, be treated alike. It cannot be supposed that it was the legislative intention when such privileges were given that they were to be used

as private property at the discretion of the recipient, but, to the contrary of this, I think an implied condition attaches to such grants that they are to be held as a *quasi* public trust for the benefit, at least to a considerable degree, of the entire community. In their very nature and constitution, as I view this question, these companies become, in certain aspects, public agents, and the consequence is they must in the exercise of their calling observe to all men a perfect impartiality."

While I frankly admit that I am able to find no case—certainly none has been cited by counsel—where the above principles have been applied to circumstances exactly like those of the case at bar, yet I am unable to distinguish it in principle from those in which it has been often applied, and we are, I think, unanimously of the opinion that they furnish us sufficient warrant for the exercise of the authority invoked.

As to the two questions presented by the record as above stated—1, Whether the depot of respondent at Wymore is sufficiently near to the business portion of Blue Springs as to afford the latter named place all the facilities and accommodations which the respondent owes to them, as a common carrier, etc.? And if not, then, 2, Is it practicable to operate respondent's branch line of railroad between Wymore and Beatrice with depots and regular service thereat both at Wymore and Blue Springs?—we have, upon thorough examination of the evidence and consideration of the same, together with arguments thereon, as well at the bar as in the exhaustive printed briefs of counsel, found both of these questions for the relator.

A peremptory writ will therefore issue, substantially as prayed, with costs, etc.

JUDGMENT ACCORDINGLY.

THE other judges concur.

**ELLEN REAL AND P. S. REAL, PLAINTIFFS IN ERROR,
v. JOHN A. HOLLISTER, DEFENDANT IN ERROR.**

1. **Covenant: EVIDENCE: POSSESSION OF GRANTOR.** In an action upon the covenants of a warranty deed for a breach of warranty, proof that the real estate conveyed was a farm recently (before the execution of the deed) purchased from the owner in possession, and soon afterwards sold and conveyed to another person, there being no adverse claimant or assertion of any adverse title by any one, the absolute right, title, and possession being conceded to be in the grantors to the last conveyance, *Held*, To be sufficient proof of possession by the grantor, *prima facie*, to justify the trial court in finding that at the time of the execution of the conveyance the grantors were in possession of the land, and the covenants of warranty contained in the deed run with the land.
2. ———: **SUBSEQUENT DEED TO CORRECT OMISSION IN FIRST.** Where, on the 24th day of June, 1879, upon the sale of real estate, the conveyance was by deed denominated "warranty deed" upon its face, but which deed was of a form in common use in some of the states as a warranty deed, but not of the form used in this state; and where, on the 14th day of February, 1880, the grantor executed and delivered to the grantee a deed of conveyance of the form and kind in common use in this state, containing full covenants of warranty, it was *Held*, That such facts were sufficient to justify the trial court in an action commenced on the 8th day of December, 1883, in finding that the second deed was executed for the purpose of correcting the apparent omission in the first one, and that the covenants of warranty of title run with the land and would convey to the grantee the right of the grantor to the covenants of *his* grantor.
3. **Trial: ACTION AGAINST TWO DEFENDANTS: MOTION FOR NEW TRIAL.** Where in an action against two defendants charging them with the making and the breach of a joint warranty in the sale and conveyance of real estate, the evidence is sufficient as to one, but insufficient as to the other defendant, the verdict and judgment being against both, and the one against whom the evidence was insufficient made no motion for new trial as to himself alone, the judgment will not be disturbed.
4. **Married Women: BOUND BY COVENANTS IN DEED.** Under the provisions of the act of the legislature of 1871, commonly

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33	93
17	661
41	251
41	522
17	661
48	147
17	661
59	596

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known as "the married woman's act," Compiled Statutes, Ch. 53, a married woman is liable upon her covenants of warranty in the sale of real estate which is her separate property, whether she be joined by her husband in such conveyance or not; section 48 of Ch. 73, Compiled Statutes, having been passed in 1866, being by said act abrogated to that extent.

5. **Covenants: EVIDENCE OF EVICTION.** Where in an action upon the covenants of warranty of title contained in a deed or conveyance of real estate it is shown that a decree in equity has been entered against the grantee and plaintiff, setting aside his title and declaring that he held as trustee for the plaintiff in that action, and requiring a conveyance to such plaintiff; and where after such decree the plaintiff in the action conveys the land to a third party, who, in an action of ejectment, recovers judgment against the present plaintiff for the possession of the property, *Held*, Sufficient proof of eviction.

ERROR to the district court for Fillmore county. Tried below before MORRIS, J.

John P. Maule and Marquett, Deweese & Hall, for plaintiffs in error.

Brown & Ryan Bros., for defendant in error.

REESE, J.

The original action in this cause was founded upon the covenants of warranty contained in a warranty deed dated February 25, 1875, executed by plaintiffs in error to one Michael Real, the grantor of defendant in error. The defendant in error was evicted by a paramount title, and brought suit upon the covenants of the deed to Michael Real, alleging that the covenants contained in the deed run with the land, inured to his benefit, and were broken. Judgment was rendered in his favor in the district court, and the defendants in that action bring the cause into this court for review by proceeding in error. The questions presented will be noticed in their order.

It is contended by plaintiffs in error that the proof

fails to show they were in possession of the land conveyed at the time the deed in question was executed, and it having been adjudicated that they had no title to the real estate, therefore the covenants were broken at the time of the execution of the deed, and became a mere chose in action, not running with the land, and hence not assignable by Michael Real to defendant in error. The testimony introduced upon the trial upon the question of the possession of plaintiffs in error was not of the most satisfactory character. The plaintiffs in error introduced no testimony. It is shown by testimony offered by defendant in error that the land was originally conveyed by patent from the United States to one Linas Clapp, under the provisions of the homestead laws. Clapp being in possession conveyed it to R. P. Walker, who took possession and soon afterward sold it to plaintiff in error, Ellen Real. She held it but a short time when she, with her husband, conveyed to Michael Real, her deed being the one on which this action was founded.

The land was a farm, forty acres of which were under cultivation, and while it is not shown directly that plaintiffs in error were ever in actual physical possession themselves, yet we think there was enough to show that the possession was theirs though held under them by another. There was no adverse claimant on the farm. The title of Mrs. Real was not questioned, and her possession by those occupying it not disputed. The trial court was justified by the evidence in finding with defendants in error upon this question of fact. Indeed we do not see how it could have found otherwise. The deed from plaintiffs in error to Michael Real contains the usual covenants found in warranty deeds in common use in this state, viz., of seizure, against incumbrances, right to convey, and of general warranty. This being true, it is clear that so far as this deed is concerned the covenant of warranty would run with the land and inure to the benefit of a subsequent grantee.

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But it is claimed that the covenant of title did not inure to the benefit of defendant in error for the reason that the deed from Michael Real to him merely conveyed the interest of Michael Real, and that this deed being without covenants of any kind, and containing no assignment of any kind, except the transfer of his naked title, defendant in error took nothing but such title as Michael had. The deed here referred to was dated June 24th, 1879. On the 14th day of February, 1880, Michael Real executed another deed to defendant in error for the same property, with full covenants. But it is insisted that this deed conveyed nothing, as the former deed had divested Michael of his title. The first deed is more than a quit-claim, and yet not such a warranty deed as is in common use in this state. It is the form used for warranty deed in Indiana, and perhaps in other states where by statute it is made sufficient as such. It is as follows:

"WARRANTY DEED.

"The grantors, Michael Real and Elizabeth Real, his wife, of the town of Milo and county of Bureau, in the state of Illinois, for and in consideration of one thousand dollars in hand paid, convey and warrant to John A. Hollister, of the county of Fillmore and state of Nebraska, the following described real estate, to-wit;" followed by a description of the land and a release of homestead rights, etc.

While this deed may not be such an one as under the law of this state would amount to a deed of full covenants of warranty, yet it shows upon its face to have been an effort to make a warranty deed, and would thus be so closely connected with the deed executed February 14, 1880, as to remove all doubt as to the intention of the grantors at the time of its execution, and to give the grantee the full benefit of the warranties contained in both. This being, in our view, beyond question, the con-

veyance from Michael Real to defendant in error must be treated as one of full covenants of title which run with the land.

The covenant of warranty is said to be the most effective of the covenants in American deeds, and in some of the states the only one in general use. *Leary v. Durham*, 4 Ga., 593-601. *Dickinson v. Hoomes*, 8 Gratt., 355-399. It runs with the land and passes with the fee to any subsequent grantee of the same title. *Rindskopf v. Farmers' Loan and Trust Co.*, 58 Barb., 36. *White v. Whitney*, 3 Metc. (Mass.), 81. *Lawrence v. Senter*, 4 Sneed, 52. *Moore v. Merrill*, 17 N. H., 81. *Le Ra De Chaumont v. Forsythe*, 2 P. & W., 507. And the last vendee with warranty may therefore maintain an action for a breach of the covenant against the first or any other warrantor. *Lawrence v. Senter*, *supra*. *Kane v. Sanger*, 14 Johns., 89. *Withy v. Mumford*, 5 Cow., 137. *Clayton v. Munger*, 51 Ills., 373. We therefore conclude that plaintiffs in error are liable to defendant in error upon the covenants in their deed to Michael Real.

It is claimed that as the proof shows that P. S. Real never at any time owned the land, it being held alone by Ellen Real, his wife, he is not liable to plaintiff in error; that the covenant of title so far as it affected him was broken at the time the deed was executed, and therefore it did not run with the land and was not assignable. This proposition is met by defendant in error with the contention that P. S. Real cannot now raise this question, he having failed to do so in the trial court by a separate motion for a new trial, or in this court by a separate petition in error. By an inspection of the record we find that plaintiffs in error joined in the motion for a new trial, neither asking any relief which might not be found to be common to both. The grounds assigned being—"1st, Error of law occurring at the trial and excepted to by defendants. 2d, That the decision and finding of the court is not sus-

tained by sufficient evidence. 3d, That the decision and finding of the court is contrary to law."

In *Long and Smith v. Clapp*, 15 Neb., 417, it has been held by this court, Chief Justice COBB writing the opinion, that in an action against two defendants charging them with the making and the breach of a joint warranty in the sale of chattels, the evidence being sufficient as to one but not to the other defendant, where the verdict was against both, and the one against whom there was but insufficient evidence made no motion for a new trial as to himself alone, and judgment was rendered against both, it would not be disturbed. It seems to us that the rule as there stated, when applied to a judgment rendered upon a joint warranty, is fully applicable to this case, and must settle it adversely to plaintiff in error, P. S. Real. It is true he filed a separate answer; but he appears to have abandoned all idea of a separate defense in the further progress of the case. The petition in error following the motion for a new trial is a joint petition.

It is next insisted that as Ellen Real was a married woman at the time of the execution of the deed in question, and the deed is executed by herself and husband jointly, she is not, under our statute, bound by the covenants in her deed. In support of this we are cited to section 48, Chap. 73 of the Compiled Statutes. This section is as follows: "A married woman shall not be bound by any covenant in a joint deed of herself and husband." This section was enacted in 1866, and is carried down from the Revised Statutes. What is generally termed "the married woman's act" was adopted in 1871. Laws of 1871, p. 68, Compiled Statutes, Chap. 58. By section 2 of this act it is provided that, "A married woman, while the marriage relation subsists, may bargain, sell, and convey her real and personal property, and enter into any contract with reference to the same in the same manner, to the same extent, and with like effect as a married man may in relation

Real v. Hollister.

to his real and personal property;" and by section 3 of the same act it is provided that, "A woman may, while married, sue and be sued in the same manner as if she were unmarried." It is very evident that the later enactments of the legislature upon this subject must control the earlier, and that by the act of 1871 the rule laid down in the section first above quoted is abrogated, and that the plaintiff in error, Ellen Real, is liable to an action upon her covenants contained in the deed executed by her, it being with reference to her property.

The last question presented by plaintiffs in error, is that there is no proof of an eviction. The testimony shows that one James W. Parker recovered a decree in the circuit court of the United States for the district of Nebraska against defendant in error, by which it was adjudged that at the time the United States conveyed the land to Linas Clapp the St. Joseph and Denver City Railway Company was entitled to a conveyance thereof, and that defendant in error held the legal title to the property in dispute in trust for said Parker, and requiring him to execute a conveyance thereof to Parker, or in case of his failure to do so in thirty days that a conveyance be made by a master in chancery, designated by the court. It is also shown by proper proof that after this decree was entered in the circuit court James W. Parker conveyed the real estate in question to A. C. Goodman, and that A. C. Goodman conveyed it to George M. Wood, and that George M. Wood brought suit in ejectment in the district court of Fillmore county against defendant in error, and on the 30th day of November, 1888, recovered a judgment against him for the possession of the property. There is some uncontradicted evidence tending to show that plaintiffs in error had notice of the pendency of these actions against defendant in error. There is no proof that an execution was issued upon the judgment for the possession of the land, nor that defendant was forcibly evicted therefrom. Nor do we think

such proof was necessary. We know of no rule of law which would require a person in possession after his title had been destroyed by a decree in equity, and a judgment of eviction had been rendered against him by a court of law, to still refuse to surrender possession, and have to pay the costs of an eviction by execution. Such proceedings as were had in the cases referred to would certainly amount to an eviction. His title was destroyed and his right to the possession of the property was gone. The paramount title was fully established. This was sufficient.

It follows that the judgment of the district court must be and is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

BURLINGTON & MISSOURI RIVER RAILROAD IN NEBRASKA, PLAINTIFF IN ERROR, v. YOUNG BEAR AND SHARP WAYNE, DEFENDANTS IN ERROR.

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Replevin: ANSWER. In an action of replevin to recover certain timber and bridges, the defendants in their answer in effect denied the unlawful detention of the property, and that the plaintiff was entitled to the immediate possession of the same; and also alleged that they had saved said property from loss and destruction by floods, and claimed salvage under the act of 1883. On demurrer to the answer, *Held*, That it stated a defense to the action, notwithstanding its failure to allege a compliance with the salvage act.

ERROR to the district court of Richardson county
Tried below before BROADY, J.

Marquett & Deweese, for plaintiff in error.

C. Gillespie, for defendants in error.

MAXWELL, J.

The plaintiff brought an action of replevin in the district court of Richardson county to recover certain bridge timber, railroad lumber, and ties. The defendant, Young Bear, filed an answer to the petition as follows: "The said Young Bear, defendant, for answer to this action, says that he had possession of the following described goods taken by said plaintiff by virtue of this replevin, to-wit: One pine bridge, stringers eighteen feet long, worth \$3.25; sixty-seven ties, worth 60 cents each, \$40.20; one railroad bridge, worth about \$400; total estimated value, \$443.45; that said property was not unlawfully detained by said Young Bear, defendant, from said plaintiff, nor was the said plaintiff entitled to the immediate possession of the same. * * This defendant has and claims a lien upon said property as taken up and secured by him, lost and washed out by the high water of the Nemaha river; that said property was rescued and caught by this defendant floating down the current in the low or bottom lands of said Nemaha river, then covered with high water; that said property was so caught in said county by this defendant, its salvor, on or about the 20th to the 25th day of June, A.D. 1883, and said defendant claims his salvage as provided by law in such cases, the same being 10 per cent of the valuation of said property, which the defendant alleges to be the sum of \$44.34. As soon as the high water permitted, the said defendant notified the said plaintiff that he had possession of said property, and was ready to deliver the same on the payment of said salvage, then due, which said defendant is now and has ever since the taking of said property been ready and willing to do; but said plaintiff wholly refuses to pay the same, or any part thereof." The prayer of the answer is for judgment against the plaintiff for the sum of \$44.34 and costs. The answer of the other defendant is to the same effect, with prayer for \$10.62 judgment. To these answers the plaintiff demurred, upon the

ground that the facts stated therein were not sufficient to constitute a defense. The demurrers were overruled, and the plaintiff electing to stand on the demurrers, judgments were rendered in favor of the defendant Young Bear for \$44.34, and Sharp Wayne for \$10.62. The error assigned is the overruling of the demurrer.

The plaintiff contends that the defendants should have stated in their answers all the facts necessary to show a compliance with the act regulating salvages, approved February 28th, 1883, Comp. Stat., Ch. 78a, to entitle them to a lien for saving the property. If the defendants relied upon the statement of facts alone as to saving the property, the position contended for would be correct, because to entitle them to a lien for salvage there must be a substantial compliance with the law. But it will be observed that the defendants, in effect, deny that the property was unlawfully detained, or that the plaintiff is entitled to the immediate possession of the same. The denial is in the form of a direct allegation "that said property was not unlawfully retained by him, nor was plaintiff entitled to the immediate possession of the same;" but, nevertheless, it is in effect a denial, and controverts the allegations of the petition upon which the plaintiff's right to recover depends. When the plaintiff admits by its demurrer that the property is not wrongfully retained, and that it is not entitled to its immediate possession, the presumption is that the defendants have complied with the statute. If this was not so the facts should have been pleaded and proof introduced. Where there is an omission to plead a material fact the presumption is that it does not exist. *B. & M. R. R. Co. v. York Co.*, 7 Neb., 487. *B. & M. R. R. v. Lancaster Co.*, 4 Id., 307. *Gibson v. Parlin*, 13 Id., 292. It is very evident that justice has been done, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

RALPH DAWSON, PLAINTIFF IN ERROR, V. WILLIAM J.
DAWSON AND GEORGE T. DAWSON, DEFENDANTS IN
ERROR.

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22	234
24	769

Forcible Entry and Detention. In an action of forcible entry and detention, where the testimony shows that the defendant is in possession under a contract for title, the action should be dismissed. *Pettit v. Black*, 13 Neb., 154. *Streeter v. Rolph*, 13 Id., 390. *C. B. & Q. R. E. v. Skupa*, 16 Id., 341.

ERROR to the district court for Johnson county. Tried below before BROADY, J.

T. Appelget & Son, for plaintiff in error.

S. P. Davidson, for defendants in error.

MAXWELL, J.

This is an action of forcible entry and detention, brought in the county court of Johnson county by the plaintiff against the defendants to recover the possession of the S. W. $\frac{1}{4}$ of Sec. 25, T. 5 N., R. 9 E. The defendants answered that they were in possession of the premises under a contract with one Eleanor J. Dawson, made in 1878, for a conveyance to them of said premises when they came of age. The cause was tried to a jury in the county court, and verdict and judgment in favor of the plaintiff. The case was taken on error to the district court, where the judgment of the county court was reversed and the cause dismissed.

The testimony tends to show that in 1878 one Eleanor J. Dawson, the half-sister of the defendants, was the owner of the land. The defendants were minors at that time and appear to have resided in the state of New York. At the time above referred to, she promised the defendants that if they would go upon the land in question and cultivate and

Dawson v. Dawson.

improve it, that when they became of age she would convey the same to them.

The testimony also shows that in pursuance of the promise the defendants took possession of the land and cultivated a portion of it, set out trees, and made certain improvements thereon. The plaintiff purchased with full knowledge of the defendants' rights.

Upon this evidence it is very clear that an action of forcible entry and detention will not lie. To maintain that action the contest is limited to the naked right of possession of the premises. If the testimony shows that the defendant has an equitable interest in the premises, one that can be protected only by a court of equity, the action will not lie. *Pettit v. Black*, 13 Neb., 154, 155. *Streeter v. Rolph*, 13 Id., 390. *C. B. & Q. R. R. Co. v. Skupa*, 16 Id., 341. Whether the contract under which the defendants hold possession is valid or not cannot be determined by the county court or a justice of the peace, but is a proper question for a court of equity, which has power to protect the rights of the parties and enforce its decrees when an action is brought to enforce or annul the alleged contract.

The county court, therefore, after hearing the evidence, should have dismissed the action, and as it failed to do so, the district court properly reversed the judgment and dismissed the proceedings. The judgment must be affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ALEXANDER ROBINSON, APPELLEE, V. PRENTISS D.
CHENEY, APPELLANT.

1. **Contract for Sale of Real Estate.** Instrument construed, and *Held*, To be a contract of sale and not a lease.
2. ———: **SIGNED BY VENDOR ALONE.** An agreement for the sale of real estate signed by the vendor alone is valid.
3. ———: **DEFAULT OF PURCHASER: FORFEITURE.** In 1880 certain real estate was sold on time, twenty negotiable notes payable at a particular bank being given by the purchaser, all to be paid within ten years from date. Time was declared in the contract to be an essential element, and on the failure of the purchaser to perform a forfeiture should ensue. In November, 1882, the purchaser did not pay the taxes until five days after the land had been sold to the defendant for taxes, when the purchaser redeemed the same. The notes due in 1883 were not sent to the bank named for collection, and three days after they were due the purchaser paid the amount thereof to the bank. In June, 1884, the vendor returned the unpaid notes to the purchaser and declared the contract forfeited. *Held*, That the alleged forfeiture dated from that time, and the purchaser not then being in default it was unavailing.
4. **Payment: PLACE OF PAYMENT.** When a bank is designated as the place at which a purchase money note is to be paid, the maker is not in default in not paying the same until the note is received at the bank.

APPEAL from Johnson county. Heard below before BROADY, J.

L. W. Colby, for appellant.

B. F. Perkins and *S. P. Davidson*, for appellee.

MAXWELL, J.

This is an action to enforce specific performance of a contract for the sale of the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 13, and the N. E. $\frac{1}{4}$ of the N.

E. $\frac{1}{4}$ of Sec. 24, in T. 4 N., R. 9 E., in Johnson county. The contract of sale is somewhat peculiar, and is as follows:

This indenture, made this twenty-seventh day of August, in the year of our Lord one thousand eight hundred and eighty, between Prentiss D. Cheney of Jersey county, Illinois, party of the first part, and Alexander Robinson, of Johnson county, Nebraska, party of the second part, witnesseth, that in consideration of the stipulations herein contained and the payments to be made as herein specified, the first party doth by these presents demise and let to the second party the possession and use of the land herein mentioned, and also contracts, bargains, and agrees to sell to the said second party said premises, situate and being in the county of Johnson, in the state of Nebraska, known and described as follows, to-wit: The south half of the south-east quarter, the south-east quarter of the south-west quarter of section No. twenty-four (24), all in township No. four (4) north, range No. nine east of the sixth principal meridian. The sum agreed upon for the possession, use, occupancy, and control of said land is \$100 yearly, which is represented and included in the notes executed by said second party, described herein, and also the whole amount of the taxes that are or may be assessed against said land. The purchase price of said land is eleven hundred and twenty dollars, of which payment has been made of one hundred and twenty dollars at the execution of the contract. The balance is to be paid without notice or demand thereof in ten annual payments at the times specified in twenty certain promissory notes of even date herewith, signed by Alexander Robinson, payable to the order of P. D. Cheney, one note being for one hundred dollars due one year after date. One note for one hundred dollars, due two years after date. One note being for one hundred dollars, due three years after date, and seven other notes for \$100, each due respectively in 4, 5, 6, 7, 8, 9, 10 years after date.

Which ten are the principal notes, the other ten notes being for the yearly interest, viz.: first note \$60, second note \$54, third note \$48, fourth note \$42, fifth note \$36, sixth note \$30, seventh note \$24, eighth note \$18, ninth note \$12, tenth note \$6, due consecutively in one, two, three, four, five, six, seven, eight, nine, and ten years after date, all payable at the office of Russell & Holmes, Tecumseh, Neb., without interest before due, and with ten per cent per annum after maturity.

And the said second party, in consideration of the premises, hereby agrees to make punctual payment of the above sums of principal and interest as each of the same respectively becomes due, and will also regularly and severally pay all the taxes and assessments against said land.

Said Alexander Robinson agrees within one year to build a house, and improve and cultivate the within described land. The crops now growing on said land are reserved to the said P. D. Cheney.

Robinson is to have possession at end of term of tenant in possession.

Robinson is to assume immediate control of the land, subject to the present tenant's rights.

Cheney is to pay tax of 1880 and all former years.

Robinson is to pay tax of 1881 and all after years.

In case the second party, his legal representatives or assigns, shall pay the several sums of money aforesaid punctually, and at the times above limited, and shall strictly perform all and singular the agreement and stipulations aforesaid after their true tenor and intent, then the said first party covenant and agree to make and execute unto the said second party, his heirs or assigns (upon request and surrender of the contract), a deed, conveying said land in fee simple, with the ordinary covenants of warranty, reserving and excepting the right of way that may be demanded for public use for railways or common roads; and it is hereby agreed and covenanted by the par-

ties hereto, that time and punctuality are material and essential ingredients in this contract.

And in case the second party shall fail to pay the taxes, or if the land shall be sold for taxes, or if said second party shall fail to make the payments of money for principal or interest, or to make improvements as herein agreed, upon the terms and at the times herein limited, and to perform and complete all and each of the payments, agreements, and stipulations herein mentioned, strictly and literally, without any failure or default, then this contract, so far as it may bind said first party shall become null and void, and all the rights and interest hereby created, or then existing, in favor of the said second party, or derived from him, shall utterly cease and determine, and the right of possession, and equitable and legal interest in the premises hereby contracted, shall revert to and revert in said first party, without any declaration of forfeiture or any act of re-entry, or any other act of said first party to be performed, and without any right of said second party of reclamation or compensation for moneys paid or services performed. And in case of the forfeiture or annulling of this contract, the said second party shall still be bound and liable to pay all taxes then due or assessed against said land; also, all installments of principal or interest that may then be due on this contract, to be regarded and considered as rent for the use of said land; also, no fixtures or improvements, temporary or permanent, shall be removed from said land.

And the said first party shall have the right, immediately upon the failure of the second party to comply with the stipulations herein, to enter upon the land aforesaid and take immediate possession thereof, together with all the fixtures, privileges, and appurtenances thereon, or in any wise thereunto belonging or appertaining. And the said second party hereby covenants and agrees to surrender unto the said first party, or his order or his assigns, the

said land and appurtenances without delay or hindrance, and no court shall relieve the said second party from a failure to comply strictly and literally with this contract.

It is further agreed and understood that whenever one-half of the purchase price mentioned shall be paid with all accrued interest and taxes the said first party shall execute the deed as herein contracted for and take notes and a mortgage for the remaining payments which shall run the unexpired time as herein fixed.

No modification or change of this contract can be made except by entry hereon in writing signed by both parties. An oversight or omission of the first party to take notice of any default of the second party shall not be deemed a waiver of their right so to do at any time.

And it is further stipulated that no assignment of the premises, or of this contract shall be valid unless with the written consent of said first party, and by endorsement of the assignment hereon.

Time is hereby declared by the parties hereto to be the essence of this contract, and a failure on the part of the second party to make the payments mentioned, to do and perform all the covenants, to comply with all the agreements herein expressed and by him agreed to be performed strictly according to the terms, boundaries, and limits of time herein mentioned, or either or any of them fully and completely, shall immediately work a forfeiture of all the rights and interests and claims of the said party of the second part in and to the land herein mentioned, and every part thereof together with all the crops thereon, and in case of forfeiture the said second party binds himself and representatives to give up immediate possession of all said tract of land whenever a demand is made therefor by the said party of the first part or their legal representatives.

And upon the non-performance of the covenants herein mentioned, or a failure to make the payments as herein specified, or any of them at the time promised, all the rights

and privileges provided in the contract giving to said second party the right to purchase the land mentioned shall immediately terminate, and thereafter his rights hereunder shall be the rights of a tenant, and he shall hold the land under this contract as a lease, and he shall be liable and subject as a tenant under the statute regulating the relations between landlord and tenant, and the first party may enforce the provisions of this contract and also recover possession of the land with all the fixtures, privileges, crops, and appurtenances thereon as if the same was held by forcible detainer.

In testimony whereof the said party of the first part has signed these presents in duplicate, and the second party has hereunto set his signature the day of the date hereof.

In presence of }
GEO. R. JAGUES, }

P. D. CHENEY.

The plaintiff alleges that the lease terminated in 1880, and that thereupon he entered into possession of the premises, and has fully performed all the conditions of the contract on his part to be performed. He also alleges that he erected a house on said premises, set out trees, erected out-buildings, broke up land, and made other improvements thereon of the value of \$1,000. The answer of the defendant is a general denial. On the trial of the cause the court found the issues in favor of the plaintiff "except that there has been no tender kept good by the plaintiff but an offer to perform instead, except as to one hundred and forty-eight dollars due August 28th, 1883, which the court finds was duly tendered, and that the tender thereof has been kept good, and that defendant on parting with his title is entitled to one thousand and nineteen and $\frac{23}{100}$ dollars, of which amount two hundred and ninety-four and $\frac{13}{100}$ dollars are due under the terms of this contract, and the court further finds that each party should pay his own costs herein made." The plaintiff thereupon tendered to the defendant the sum of \$294.13, which not being received was

paid to the clerk of the court for the defendant's use. This sum seems to have been the amount found due with previous payments on one-half of the purchase price. The court also required the plaintiff to pay to the clerk of the court for the defendant the further sum of \$725.80 within 90 days from the date of the decree, and upon his failure to do so the action be dismissed. The defendant appeals.

The first point made by the appellant is, that the contract is merely a lease with a privilege to purchase. It is said there is no agreement on the part of Robinson to purchase. But this is not necessary. All that the statute requires is, that the party by whom the sale is made shall sign the contract. Comp. St., Ch. 32., § 5. *Ballard v. Walker*, 3 Johns. Cas., 60. *Clason v. Bailey*, 14 Johns., 484. *McOrea v. Purmot*, 16 Wend., 460. *Worrall v. Munn*, 1 Selden, 229. *Fenley v. Stewart*, 5 Sand., 101. *Lester v. Jewett*, 12 Barb., 502. It was unnecessary, therefore, for the plaintiff to sign the contract. While there are terms used in the instrument that would imply a lease, yet when the whole instrument is construed together, it was clearly intended as a sale and not as a lease. The first objection, therefore, is untenable.

2d. That the plaintiff failed to perform the terms of his agreement. The failure to perform is alleged to be—1st, not paying the taxes due on the land for 1881; and 2d, to pay two notes for \$148, due August 27th, 1883. The testimony upon these points tends to show the following facts:

On the 8th day of November, 1881, the land in question was sold to Cheney for the taxes due thereon for 1881. Five days afterwards the plaintiff redeemed the land. Mr. Cheney testifies that he has not received the money, but evidently it is his own fault as the money was in the hands of the county treasurer. No notice was given to the plaintiff claiming a forfeiture, nor were his notes returned; and for the reasons stated hereafter, we think there was a

Robinson v. Cheney.

waiver of the condition. That the plaintiff failed to pay the two notes amounting to \$148, due Aug. 27th, 1883, which were not paid till Sept. 3d, 1883. These are the two particulars wherein it is claimed the plaintiff failed to comply with his contract.

It will be observed that all the notes are "payable at the office of Russell & Holmes, Tecumseh, Neb." These gentlemen are bankers at that place. Mr. Holmes testifies that the notes in question were *never* sent to their office, and consequently had the money been tendered at the day the notes could not have been delivered to the maker when paid. The terms of the contract by implication require the notes to be at the place of payment for the purpose of being delivered up. Otherwise the payee might transfer them before due, and being negotiable, the holder would acquire a valid title, while the maker's liability would continue. The notes previously due had all been sent there; and, as the record shows, all paid a few days after due, and the money accepted by the defendant. Until the notes were sent to Russell & Holmes the plaintiff was not required to pay the same, and the failure to so send them is a waiver of the condition. The plaintiff offered testimony, which was excluded, to the effect that his failure to pay at the day was in consequence of the sickness of his wife, and his consequent inability to leave home, as he resided some 15 miles from Tecumseh. This testimony would have been proper, not as a justification, but to show that the default was not willful. On the 17th of June, 1884, the defendant returned to the plaintiff his unpaid notes. At this point he seems to have been desirous to terminate the contract, and this was the means that he deemed essential to effect that purpose—the construction which he placed upon the contract. At that time all payments had been made, and the plaintiff was not in default. The contract, therefore, remains in full force. A court of equity will not declare a forfeiture unless com-

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pelled to do so. It violates every principle of justice to take the property of one man and give it to another without compensation upon a simple failure to pay at the day, when there had not been gross laches. While in particular cases such forfeitures are sustained, yet they will be denied in all cases where the vendor has directly or indirectly waived the condition on which they depend. A forfeiture, being in the nature of a penalty, will not be implied, but must be clearly established. It is very clear that justice has been done. The defendant is to receive the entire purchase money, with interest—all to which he has any equitable claim; while the plaintiff is enabled to preserve his home—a shelter and support for himself and family. In the discussion of the case, the cases where time is the essence of the contract have not been considered, as the question does not arise. The judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

HARRIET C. ROBERTS, APPELLEE, v. PRENTISS D.
CHENEY, APPELLANT.

MAXWELL, J.

The essential questions are the same in this case as in *Robinson v. Cheney*, just decided, and for the reasons stated in that opinion the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

ELI GRAY, PLAINTIFF IN ERROR, V. MELISSA A. SMITH,
DEFENDANT IN ERROR.

Judgment: ACCEPTANCE OF AMOUNTS BARS APPEAL ON ERROR.

A party who accepts the amount of an order or judgment cannot afterwards prosecute an appeal from the same.

MOTION to dismiss proceedings in error to the district court of Richardson county, where the cause was tried before DAVIDSON, J.

Frank Martin and J. D. Gilman, for the motion.

E. W. Thomas, contra.

BY THE COURT.

The defendants in error brought an action against the plaintiffs in the district court of Richardson county to recover the possession of the S. W. $\frac{1}{4}$ of section 19, T. 3 N., R. 13 E. The plaintiff in error (defendant below) filed an answer to the petition, wherein he alleged: 1st. That he was the owner of the land. 2d. That he possessed certain tax deeds for the same, and praying that if the court found his title invalid he might be allowed said taxes with interest. On the trial of the cause the court found that the tax deeds conveyed no title, and that the amount paid by the plaintiff in error for taxes was the sum of \$30.30, which was a lien on the land, and that the plaintiffs below (defendants in error) were entitled to the possession of the land. The defendant below thereupon brought the case on error into this court, praying for a reversal of the judgment. Afterwards he accepted the amount of the judgment and receipted for the same. The attorneys for the defendants in error now move to dismiss the proceedings in error, for the reason that the plaintiff has accepted the amount awarded to him by the court.

17	682
38	574
17	682
53	599

The question here involved was before this court in *Hamilton County v. Bailey*, 12 Neb., 57. In that case it is said: "He (the plaintiff in error) cannot accept the amount awarded to him by an order or judgment, and thereby receive the benefit of the same, and appeal from such order or judgment." *The Ind. School District of Altoona v. The District Tr. of Delaware*, 44 Iowa, 201. *M. M. R. Co. v. Byington*, 14 Id., 572. *Borgathous v. The Farmers and Merchants Ins. Co.*, 36 Id., 250. This, we think, is a correct statement of the law, and it is decisive in this case. The motion must therefore be sustained.

JUDGMENT ACCORDINGLY.

THE other judges concur.

THE STATE OF NEBRASKA, EX REL. WILBUR F. BRY-
ANT, V. JAMES KNOX.

17	683
53	273
53	308
17	683
62	445n
62	446n

Embezzlement: COMPLAINT set out in the opinion, *Held*, To be sufficient to charge the crime of embezzlement.

ORIGINAL application for mandamus.

Wilbur F. Bryant, pro se.

Thomas M. Franse, for respondent.

MAXWELL, J.

The only question presented in this case is, whether or not a certain complaint, made before the defendant and filed with him, charges one with a crime. The complaint is as follows, omitting the defendant's name:

"STATE OF NEBRASKA, }
"DAKOTA COUNTY. }

"Before me, James Knox, a justice of the peace in and

for Pigeon Creek precinct, said county, personally appeared Wilbur F. Bryant, who, being by me first duly sworn, says that , late of the county aforesaid, on the twenty-fifth day of April in the year of our Lord one thousand eight hundred and eighty-four, in the county of Dakota, and state of Nebraska aforesaid, being an officer, to-wit, being the school district treasurer for school district numbered twenty-six, in the said county of Dakota and state of Nebraska, and being charged as such officer with the collection, receipt, and safe keeping, transfer and disbursement of the public moneys belonging to said school district, certain of said money, to-wit, thirty-five dollars of the public moneys belonging to the said school district numbered twenty-six, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use, which said moneys had then and there come into the possession and custody of the said by virtue of said office and in the discharge of the duties thereof, and so the said is guilty in manner aforesaid of the crime of embezzlement of the said public moneys, so as aforesaid by him converted and used contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Nebraska.

"WILBUR F. BYRANT.

"Subscribed in my presence and sworn to before me this 12th day of May, 1885.

"JAMES KNOX,
"Justice of the Peace."

The complaint contains the name of the person accused, which has been omitted, as it would be unfair to place his name in the reports connected with the commission of a crime until the fact of his guilt is established by proof.

It is claimed on behalf of the respondent that the complaint is insufficient. First, Because the ownership is not alleged to be in any person, body corporate, or association. It is alleged in substance that the accused was treasurer of

school district No. 26, of Dakota county, and that as such officer, being charged with the collection, receipt, and safe keeping, transfer and disbursement of the public moneys belonging to said school district, certain of said moneys, to-wit, thirty-five dollars of the public moneys belonging to said school district, did unlawfully, fraudulently, and feloniously embezzle and convert to his own use.

It is said a school district is not a corporation of whose existence a court will take judicial notice, and *State v. Butler*, 26 Minn., 90, is cited to sustain the position.

Sec. 1, Chap. 79, Comp. Statutes, provides that, "The term school district, as used in this chapter, is declared to mean the territory under the jurisdiction of a single school board authorized by this chapter." * *

Sec. 2 provides that, "Every duly organized school district shall be a body corporate, and possess all the usual powers of a corporation for public purposes, by the name and style of school district number ... of county."

It is unnecessary to set forth the steps taken to organize the district, but it may be styled by its name or number, and that will be sufficient, *prima facie*, to show its corporate capacity. There is nothing, therefore, in the first objection.

Second. That the particular kind of money embezzled must be alleged. This, however, is unnecessary, as the presumption is it was lawful money such as had been received for and could be applied to the payment of debts of the district. The absence of this allegation, therefore, is not a fatal defect.

Third. That an allegation of value is indispensable. This would be necessary if property, or bank bills not a legal tender, had been embezzled; but where the allegation is the embezzling of thirty-five dollars in *money*, the amount designated expresses the value, the presumption being that it was lawful money.

We are of the opinion, therefore, that the complaint charges an offense. As, however, the justice appears to

have acted in good faith, under a mistake as to his duty, in his refusal to act upon the complaint, the object of the action probably will be accomplished without issuing a writ to compel him to act. It will therefore be withheld until the cases from the 7th district are taken up, at which time application may be made for further order if desired.

JUDGMENT ACCORDINGLY.

THE other judges concur.

17 686
31 143

THE STATE OF NEBRASKA, EX REL. MILTON MCKINNON,
V. JOSEPH SCOTT ET AL.

1. **School Lands: LEASE: FORFEITURE: NOTICE.** Where a lessee of school lands is in default in the payment of rent for the period of six months it is the duty of the commissioner of public lands and buildings to cause notice to be given to him that if the amount due is not paid in six months thereafter the lease will be declared forfeited. After the expiration of six months from the time such notice was given, the board of public lands and buildings may declare such contract forfeited.
2. ———: **JURISDICTION OF DISTRICT COURT.** Such order may be reviewed on error in the district court.
3. **Mandamus Against Board of Public Lands and Buildings.** Where a mandamus is sought to compel the board of public lands and buildings to accept the highest bid for the leasing of certain school lands, the writ will be denied unless it is clear that there is an abuse of discretion, and that the sum bid is the full rental value of the lands.

ORIGINAL application for mandamus.

N. C. Abbott, for relator.

William Leese, Attorney General, for respondent.

MAXWELL, J.

This is an application for a mandamus to compel the defendants to accept a bid for the leasing of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of sec. 6, T. 8, R. 7 E., in Lancaster county, and to execute a lease to him for the same.

It appears from the application that in December, 1880, one Valentine Meyer entered into a contract of lease with the state of Nebraska for the land above described, and that said Meyer, since the 1st day of January, 1881, has failed to pay the rental price agreed upon in said contract. That Meyer having become a non-resident of the state, the defendant, on the 27th of June, 1884, caused a notice to be published in the *State Journal*, a newspaper published in Lancaster county, which so far as it relates to Meyer is as follows:

“OFFICE OF COM’R OF PUB. LANDS AND BUILDINGS,
“LINCOLN, NEB., June 19, 1884.

“* * * To Valentine Meyer, lessee of S. E. S. W. and S. W. S. E. 6, 8, 7 E. You will take notice that your contracts of lease with the state of Nebraska are delinquent for more than six months, and you are hereby notified that if all payments due on said contracts of sale and lease are not paid as provided by law, said contracts will be forfeited as provided by section 20, page 311, Session Laws of 1883.

[SEAL.]

“A. G. KENDALL,

“*Com. Public Lands and Buildings.*”

It also appears that Meyer failed to pay the amount due on said land within six months after the publication of said notice, and the contract was thereafter declared forfeited. It is also alleged that the only sum ever paid by Meyer was \$2.50, and that he has abandoned said land.

The principal question in the case is the validity of the forfeiture.

Section 20 of the act referred to is as follows:

"If any lessee of educational lands shall be in default of the semi-annual rental due the state for the period of six months, or any purchaser of educational lands be in default of the annual interest due the state for one year, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that if such delinquency is not paid within six months from the date of the service of such notice his lease or sale will be declared forfeited by the board of educational lands and funds. If, after such notice, the amounts due are not paid within six months from the date of the service of such notice thereof, the said contract of lease or sale may be declared forfeited; *Provided*, The provisions of this section shall not apply to subdivisions of land laid out and platted to town sites, or additions thereto, but forfeitures of contracts for such 'subdivided lands' shall be made as nearly as practicable in the manner now provided by law for the foreclosure of mortgages on real estate; and it shall be lawful to include as many defendants in one action as may be deemed necessary; *Provided, further*, That nothing herein contained shall debar any of said defendants from maintaining a separate defense in his or her behalf, and the lands therein described shall revert to the state the same as though such lease or sale had never been made, and the order making such forfeiture shall be spread upon the records of the board of educational lands and funds. In case the owner of such contract of sale or lease be a non-resident of this state, or his address be unknown, the notice herein contemplated shall be published three weeks in some newspaper published or of general circulation in the county where the land is situated. The forfeiture may be entered by said board after ninety days from the date of such published notice. The provisions of this section shall apply alike to all the lands heretofore sold or leased, and to all lands hereafter sold or leased as

educational lands of this state; *Provided*, The owner of any contract of sale or lease so forfeited may redeem the same by paying all delinquencies and costs at any time before such land is again sold or leased."

Section 20 of the act of 1877, Laws 1877, 174, which was in force when the lease to Meyer was executed, was as follows:

"In case of the violation of any of the covenants in the contract furnished by the lessee of such lands, by the non-payment of moneys at the time specified in the contract, by the commission of waste upon the land, by removal of any improvements on the land without the consent of the board, or by the commission or omission of any act constituting a breach of the contract or covenants contained in said lease, the commissioner of public lands and buildings, immediately upon receiving information of such breach of contract, shall notify the lessee so violating his covenants or contract that the terms of his lease are in default as aforesaid, and that unless the terms aforesaid are complied with within thirty days after such notice he will proceed to take steps to enforce the forfeiture of said lease as hereinafter provided. The terms of this section shall apply alike to all lands sold or leased under the provisions of this act, and all lands heretofore sold or leased as school lands of the state, and such forfeiture shall be declared by the judge of the district court of the district in which the county is located in which the said land is situated, upon the application of the district attorney of said district, who, upon notice from the commissioner of public lands and buildings of such default or violation, shall proceed against said lessee in the name of the state of Nebraska for forcible detainer, and obtain restitution in the same manner and with like effect as in case of tenants holding over. And in case the lessee of said lands is a non-resident of this state, service shall be had by publication as in cases for foreclosure of mortgages against non-

residents. In case of the violation of any contract or covenant by the lessee of such lands as aforesaid, the commissioner of public lands and buildings shall accompany his notice of such delinquency to the prosecuting attorney with attested copies of all papers which may prove the covenants and the violation thereof."

It will be seen that the principal change made by the act of 1883 is in the tribunal to determine in the first instance whether, upon default of payment, a cause of forfeiture had arisen. The questions involved are purely questions of facts, viz., whether the lessee or purchaser has made payments as provided in the contract. If not, then, upon due notice to him—personally, if he can be found in the state, or by publication, if absent—the board, after the expiration of six months, may declare the contract forfeited. If the lessee or purchaser is dissatisfied with the decision he may take the case on error to the district court, where it may be reviewed. The purchaser or lessee is deprived of no right which existed when the contract was entered into, but the procedure is simplified and the expenses materially reduced.

We hold, therefore, that the provision for forfeiture in the act of 1883 is valid, and applies to leases made under the act of 1877; and as Meyer was constructively served with notice, and failed to appear and redeem within the time limited by law, the order of forfeiture made by the defendants is in full force and bars the right of Meyer to the land.

It is a fundamental doctrine of equity that specific performance will not be decreed in favor of one who has been guilty of gross laches which cannot be explained consistently with good faith. *Roby v. Cossitt*, 78 Ill., 638. *M' Dermid v. M'Gregor*, 21 Minn., 111. *Eastman v. Plumer*, 46 N. H., 464. *Alloway v. Braine*, 26 Beav., 575. *Eastern R. R. Co. v. Knott*, 10 Hare, 122. This rule certainly applies in favor of the state, where a purchaser of the lands

held in trust by it for the support of schools fails for years to pay the rent or interest on the land purchased or leased by him, and thus deprives the state to that extent of the benefit of the fund. The statute merely extends the equity rule that where there has been great and improper delay by a purchaser, the vendor may fix a reasonable time within which the purchaser must perform on his part or be barred. *Nott v. Ricard*, 22 Beav., 307. *Eads v. Williams*, 4 DeG., M. & G., 674. *Gordon v. Mahoney*, 13 Ired. Eq., 404. 2 Leading Cases in Equity (4th Ed.), 1061. A reasonable time was allowed Meyer in this case, of which he did not avail himself. His rights, therefore, in the premises have ceased.

We will not grant a mandamus, however, to compel the board to accept a bid for the sale or lease of the school lands unless it is clear that there is an abuse of discretion. There is no evidence before us that the bid of the relator is the full rental value of the land, nor that the board did not perform its duty in not accepting it. As the board is charged with the administration of the trust, it must be clear that there is an abuse of the same before the court will interfere. The writ must therefore be denied.

WRIT DENIED.

THE other judges concur.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, PLAINTIFF IN ERROR, V. JOHN SIMS, DEFENDANT IN ERROR.

1. **Railroads: LIABILITY FOR STOCK KILLED.** Under the act of June 20, 1867, a railroad company is liable for stock killed upon its track while running at large in the night time at a point where the company was required but failed to fence its track,

notwithstanding stock is prohibited by statute from running at large in the night time.

2. Petition examined, and *Held*, Good when assailed after verdict

ERROR to the district court of Richardson county. Tried below before BROADY, J., upon the following stipulation of facts:

It is stipulated in this case that the facts are as follows:

The plaintiff owned the animal that was killed. He lived close to the defendant's railroad track, on the north side of track. There was a strip of grass land along and near the railroad track, and back from the track on the north; the land was cultivated south of the railroad track, and a few rods away was the Nemaha river. The plaintiff worked the animal during the day-time June 3, 1883, and at night turned the animal loose to graze, as he was in the habit of doing at night time. The animal was struck by one of the defendant's engines and trains about midnight of June 3, 1883, and killed. The plaintiff knew only of the passage of the fast train known as the "Cannon Ball" train, which passed both ways during the night, and it was one of these that killed the animal. The animal was worth seventy-five dollars. The railroad track was not fenced where said accident occurred, and it was not on a road crossing, nor within the limits of a town or village. The said railroad had been in operation for several years prior to the accident. Said animal was killed without any negligence or fault on the part of the defendant other than the fact that the railroad track was not fenced; and there was no negligence on the part of the plaintiff other than the fact of allowing the animal to run at large at night in the manner above stated, as was his usual custom. This is the final and full stipulation of all the facts.

Marquett & Deweese (*E. W. Thomas* with them), for plaintiff in error.

H. T. Hull, for defendant in error.

REESE, J.

The principal question involved in this case is, whether the plaintiff in error was liable for the value of stock killed by its train in the night time, the stock being allowed to run at large in violation of law. Comp. Stat., Ch. 72, Art. I.

This question was before this court in *B. & M. R. R. Co v. Brinkman*, 14 Neb., 70, and we think that decision fully covers this case. In the opinion of the court, written by Judge MAXWELL, the following language occurs, which we adopt as decisive of the case, viz.: "The statute requires all railroad companies which have been in operation six months to fence their track and put in cattle guards at road crossings, and provides that in case of failure to do so 'they shall be absolutely liable to the owners of any live stock injured, killed, or destroyed by their agents, employes, or engines,' etc.; and also declares that when such fences and guards have been fully and duly made, and shall be kept in good and sufficient repair, such railroad shall not be liable for any such damages, unless negligently or willfully done.. Where they have failed to fence their track, therefore, the question of negligence of the owner of the stock killed or injured does not enter into the case. The defendant in error, by merely permitting the animals killed to run at large in the night time, is not thereby deprived of the right to recover."

A question as to the sufficiency of the petition of defendant in error is also presented. The petition alleges, in substance, among other things, that the plaintiff in error was running and operating its road in Richardson county, at the time of the accident, without fencing on either side thereof, and that the stock killed was running at large on the premises of defendant in error through which plaintiff

 Cozine v. Hatch.

in error ran its road when the damage was done. It is claimed by plaintiff in error that this is not a sufficient allegation of its failure to fence its track at a point where it was its duty to fence, nor that the accident occurred by reason of the want of a fence, and that there is nothing to show that the place where the stock got onto the railroad track was a place where the company had the right to fence. The petition, alleging as it does that the stock was killed on the premises of the defendant in error while running at large, and that the railroad ran through the premises, in connection with the fact that the answer alleges, as the defense, that defendant in error willfully and purposely turned the animal loose to run at large on and about the defendant's railroad track in the night time, and that while it was so running at large in the night time was struck by the engine of plaintiff in error, is a sufficient presentation of the issue to sustain a judgment where no objection is made until after verdict and judgment. No objection appears to have been made to the petition in the court below. While the petition is not as definite as might be desirable, yet it is sufficient to sustain the judgment.

No error appearing, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

17	694
30	520
17	694
53	761

C. C. COZINE, PLAINTIFF IN ERROR, v. MELVIN D. HATCH, DEFENDANT IN ERROR.

1. **County Court: TRIAL OF CAUSES.** The provision of the statute requiring the county court to continue all cases undisposed of on the third Monday of each month does not prevent the court from hearing and deciding cases by agreement at any time during the month.

2. **Costs.** Where costs taxed in a cause appear to be exorbitant or excessive, the proper remedy is by a motion to retax, made to the court where the alleged mistakes are made.
2. **County Court: ATTACHMENT: ORDER FOR SALE OF ATTACHED PROPERTY.** Where the county court issued an order of sale for the sale of attached property, after judgment, and it is alleged that the court erred in doing so, the judgment containing no order appropriating the attached property to its payment, the proper practice would be to move the county court for a return and vacation of the order of sale. If such motion should be overruled the decision thereon might be reviewed. But the issuance of such order of sale, even if erroneous, would be no reason why the judgment should be reversed.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hardy & McCandless, for plaintiff in error.

T. D. Cobbey, for defendant in error.

REESE, J.

An action in attachment was commenced in the county court on the 19th day of February, 1885. The defendant in the action, plaintiff in error here, appeared, and the cause was adjourned from time to time until the 15th of April, at which time the cause was, by the agreement of the parties, adjourned until the 23d day of April. At that time the parties appeared for trial. The plaintiff in error demanded a jury. A jury was selected and impaneled, and the trial proceeded without objection. The trial resulted in a verdict in favor of the defendant in error for the sum of \$274.06. Judgment was accordingly rendered.

It is contended that as the amount involved was more than \$200, the case was what is denominated a term case, and could only be tried by the county court during the regular term of the court, and that therefore the court had no jurisdiction over the subject matter. We do not so understand the law. The cause was set for trial out of the

term by agreement of the parties in open court. They appeared on the day fixed and tried the cause without objection. Had objection been made before the commencement of the trial, it is quite probable nothing could have been done until the next term of court. But where all objection was waived, and the parties consented to proceed with the trial and did so, it gave the court jurisdiction over them. *Hansen v. Bergquist*, 9 Neb., 269. *Gillette v. Morrison*, Id., 395.

It is alleged that illegal costs were taxed to plaintiff in error by the county court. No motion was made to retax the costs. This was necessary. *Woods v. Colfax County*, 10 Neb., 552. The county court would still have the authority to correct this error, if any exists.

The judgment rendered April 23 made no reference to the attached property. A simple judgment was entered. On the 5th of May following, the defendant in error filed a motion for an order of sale to sell the attached property, and an order of sale was issued. The action of the court in issuing the order of sale was not erroneous. While it would have been more regular for the judgment to have provided expressly for the sale of the attached property, yet as the court had jurisdiction over the attached property by the levy, and over the plaintiff in error by his appearance, the issuance of the order during the following term of court would not be without authority. The same strictness is not required of courts of inferior jurisdiction as of courts of general jurisdiction. Aside from matters of a jurisdictional character all presumptions and intendments are in favor of the regularity of their proceedings. *Hansen v. Bergquist*, *supra*.

Even though the county court did err in the issuance of the order of sale, it would not be sufficient to reverse the judgment rendered upon the verdict of the jury. The better practice would have been to move the county court to recall the order of sale, and upon its failure to do so its action could have been reviewed.

Moore & Cozine v. Herron.

No error affirmatively appearing upon the record, the judgment of the district court in affirming the judgment of the county court is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

**MOORE AND COZINE, PLAINTIFFS IN ERROR, V. N.
HERRON, SHERIFF, DEFENDANT IN ERROR.**

1. **County Court: CONTINUANCE: LEGAL HOLIDAY.** Where an action of replevin in the county court was continued by agreement to the 22d of April—a legal holiday, *Held*, That an order made on that day continuing the case to the May term was a nullity; but that the statute in relation to such courts continued the cause, it being after the third Monday of the month.
2. **Replevin: TRIAL: BURDEN OF PROOF.** Where property is taken from the defendant and delivered to the plaintiff in an action of replevin, the defendant is not thereby divested of his title to the property. The burden of proof is on the plaintiff to establish on the trial his right to the possession.
3. ———: ———: **RIGHT OF POSSESSION.** Where property has been taken under a writ of replevin, either party may have the right to the possession determined, and a dismissal of the action by the other will not deprive him of that right.
4. ———: **FINAL JUDGMENT.** It is the final judgment that determines the rights of the parties and not the mere delivery of the property under the writ.
5. ———: **DISMISSAL OF ACTION BY PLAINTIFF.** Where before trial the plaintiff dismisses the action, the defendant has a right to proceed with the trial and have the question of the right of possession of the property determined; but not if the action is dismissed unconditionally on the motion of the defendant. Qualified dismissal, with proof of right of possession in defendant, *Held*, After judgment, error without prejudice. Where the plaintiff in replevin has given an undertaking as required by law to duly prosecute the action and pay all costs and damages awarded against him, etc., he cannot in addition be required to give other security for costs.

17	697
36	220
17	697
42	850
17	697
47	704
48	296
48	608
17	697
52	681
17	697
56	181
56	744

Moore & Cosine v. Herron.

ERROR to the district court for Gage county. Tried below before BROADY, J.

Hardy & McCandless, for plaintiffs in error.

T. D. Cobbey, for defendant in error.

MAXWELL, J.

This is an action of replevin brought in the county court of Gage county to recover "certain cattle." Summons was issued to the coroner, returnable March 7, 1885, at one o'clock P.M. The property in controversy was taken under the writ and delivered to the plaintiffs upon their giving a sufficient undertaking. As the value of the property exceeded \$200, the cause was continued to the regular term on the 6th day of April, 1885, at which time it was again continued till the 15th of April. On the 6th of April, the defendant filed a motion for security for costs because the plaintiffs were non-residents. On the 15th of April the cause was continued by agreement till the 22d of that month, and a jury waived in open court. The motion to give security for costs was sustained, and the plaintiffs required to give the same by the 22d inst., or the cause stand dismissed. The 22d of that month being "Arbor Day," and a legal holiday, the cause was continued till the May term of the court, commencing May 4th. On May 4th the plaintiffs filed the following paper in said court:

"The plaintiffs, appearing solely and specially for that purpose, and none other, here challenge the jurisdiction of the court to proceed further in this action, and allege the following grounds for such challenge, viz.:

"1st. On, to-wit, April 15th, the court continued this case for trial to and set the same for trial on the 22d day of April, 1885, at 10 A.M. of that day, which said day was a legal holiday, whereby the court lost jurisdiction of said action.

"2d. That prior to April 15th, 1885, the defendant filed a motion in this court in this case for an order requiring the plaintiffs to give security for costs in this action on the grounds that they were non-residents of this state and county, a copy of which said motion is hereto attached, marked exhibit 'A,' and made part hereof, and that on, to-wit, April 15th, 1885, the court sustained said motion, and required the plaintiffs to give security for costs, and made the following order and entry in the court's docket of the proceedings of the case. "April 15th, 1885, cause continued until April 22d, 1885, at 10 A.M., by agreement of parties, and jury waived by parties in open court; motion to give securities for costs sustained, and plaintiffs given until April 22d, at 10 A.M., to give security for costs, or case stand dismissed." That plaintiffs were unable to give, and failed and neglected to give, security for costs as required by said order, and that under said order and by operation of law said cause stood dismissed on said 22d day of April, and the court thereby lost jurisdiction to proceed therein.

"3d. There is no cause now pending in this court between these plaintiffs and the defendant.

"4th. The court had no power or authority on the 22d day of April, 1885, to continue this cause to May 4th, 1885, on its own motion, as appears from the record that he did.

"5th. The orders of this court, as appears from the record of this case, made at defendant's request, have worked a dismissal of the case, and thereunder the case now stands dismissed out of court, and the court has no jurisdiction to proceed further therein.

"6th. For all the reasons aforesaid, the plaintiffs now challenge and deny the right of the court to proceed further in the case."

The application was overruled, and the plaintiffs made no further appearance. The case was set down for trial

on the 5th of May, 1885. On that day the defendant appeared and filed a motion to dismiss the action, because the plaintiffs have failed to give security for costs as ordered and have failed to prosecute the action, and that the defendant "be allowed to prove the value of the property and damages." The motion was sustained, and the defendant allowed to prove his damages. Evidence was thereupon introduced, and the court found the value of the property to be the sum of \$319.16, and damages \$5, and rendered judgment against the plaintiffs for a return of the property or its value. The case was taken on error to the district court, where the judgment of the county court was affirmed.

A great deal of stress is laid upon the adjournment to the 22d of April, 1885, it being a legal holiday. An examination of the statute, however, shows that it is a legal holiday only so far "as regards the presenting for payment or acceptance, and the protesting and giving notice of the dishonor of bills of exchange, bank checks, or promissory notes made after the passage of this act." Comp. Stat., Ch. 41, § 8. The apparent object of the act was to enable all persons so desiring to devote the day to setting out trees, etc. Sec. 38 of chapter 19 of the Comp. Stat., 55, entitled courts, however, provides that "no court can be opened on Sunday, nor can any judicial business be transacted on Sunday or on any legal holiday, except," etc. There was no authority, therefore, to order an adjournment on that day, and the order was a nullity. The court, however, would not thereby lose jurisdiction, as all business undisposed of would be continued until the next term. At the next (May) term the plaintiffs, who had obtained the property under the order of replevin, and were then in possession, objected to the right of the court to proceed and determine the rights of the parties. These objections certainly were made under a misapprehension of the nature of an action of replevin.

Delivery of the property to the plaintiff by virtue of an order of replevin, where a suitable undertaking is given, invests the plaintiff with the possession of the property, and, pending the suit, the defendant, though he be the owner, cannot disturb the plaintiff's possession. Such delivery, however, does not affect the question of ownership. It in no manner tends to prove title in the plaintiff. It is but a temporary right which may be terminated by the plaintiff's discontinuance of the action or by judgment against the plaintiffs. Wells on Rep., § 474. *Bruner v. Dyball*, 42 Ill., 34. *Speer v. Skinner*, 35 Id., 282. *Lovett v. Burkhardt*, 44 Penn. St., 174.

Under our statute, Code Sec. 191a, requiring a return of the property if a return can be had, in case the judgment is for the defendant, the effect of taking property under the order is not to divest the defendant of his interest or title therein. This can only be done by a final judgment in favor of the plaintiff. In other words, the effect of taking the property from the defendant and delivering it to the plaintiff is simply to transfer to him the possession while the action is pending. The title to the property is not changed. Wells on Rep., § 476, and cases cited. To give the plaintiff the right to retain the property, he must prove such facts as will entitle him to judgment in his favor. It is the final judgment that determines the rights of the parties, not the mere delivery of the property under the writ. A plaintiff, therefore, who obtains possession of property under an order of replevin must establish his right to the same on the trial of the cause. He assumes the burden of proving that the possession of the defendant was *wrongful*. When, therefore, the plaintiff dismisses the action, the defendant is entitled to proceed and have the right to the property determined. The defendant's remedy upon the undertaking is not exclusive. He may maintain replevin or an action for the conversion of the property. *Bruner v. Dyball*, 42 Ill., 34. Upon the plain-

tiffs' theory of the case, therefore, the defendant was entitled to judgment.

The second motion to dismiss, however, was filed by the defendant. The first ground of the motion is the failure to give security for costs. No doubt an officer, before issuing or serving the writ, may demand his fees or require security to be given therefor; and this power will continue until an undertaking is given and approved. The condition of the undertaking required by statute is, that "the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against him," etc. Such undertaking is security for the costs of the action, and after it is filed no other security need be given for that purpose. The object of the code is to simplify procedure, not to impose unnecessary onerous conditions upon either of the parties to the suit. As ample security for costs had already been given, the first point in the motion is not well taken.

2d. The failure to prosecute the action.

It is pretty clear that a motion to dismiss an action in replevin without a trial, where the property has been taken from the possession of the defendant and delivered to the plaintiff, is a practice not to be commended. If the plaintiff fails to prosecute, the court should permit the defendant to proceed with the trial on his part, and thereupon to render judgment according to the testimony. This was the course pursued in this case, and was covered by the last sentence in the defendant's motion. Liberally construed, the motion amounts to this: "That the defendant be allowed to prove the value of the property and damages," and that thereupon the plaintiff's action be dismissed. As this was in substance the course pursued, the order made in the case was error without prejudice. Where the plaintiff dismisses the case to avoid a trial, the court has power to retain the case and determine the questions of a return of the property and for damages. Wells on Rep., § 516, and cases cited. The plaintiffs, in effect, refused to appear at

Moore & Cosine v. Herron.

the trial and establish their right to the property. They now, in effect, without any showing of right to the property or any sufficient cause for their neglect, ask the court to grant them relief. This we cannot do. So far as appears, they have no right to the property whatever, or, if so, they have lost the same through willful laches. There is no error in the record, and the judgment is affirmed.

JUDGMENT AFFIRMED.

THE other judges concur.

SAME V. SAME.

Constitutional Law. Under the constitution of 1875, a party may as a *right* have a cause reviewed either by appeal or on error in the court of last resort, and the legislature has no authority to impose a penalty of five per cent upon the affirmance of the judgment.

MOTION to correct judgments in preceding two cases.

T. D. Cobbey, for the motion.

BY THE COURT.

The judgment of the court below was affirmed in each of these cases, and the attorney for the defendant in error now moves for judgment for five per cent in addition to the amount due the defendant in error, in accordance with Sec. 596 of the code, which provides that, "when a judgment or final order is affirmed in the supreme court, the court shall also render judgment against the plaintiff in error for five per cent upon the amount due from him to the defendant in error, unless the court shall enter upon its minutes that there was reasonable ground for the proceedings in error."

The proper construction of this section was before this court in *Martin v. Coppock*, 4 Neb., 173, and it was held that the penalty would be imposed only in cases where it was clear that they were brought into this court for the sole purpose of delay. That decision was announced from the bench, but was not reduced to writing. The rule then established, however, has been steadily adhered to. Whether at the present time the penalty can be imposed in any case may be questioned.

When the statute in question was passed, and up to the time the constitution of 1875 took effect, a petition in error could be filed only by leave of the supreme court or a judge thereof. General Statutes, page 628.

Section 24 of Art. I. of the constitution of 1875 provides that, "the right to be heard in all civil cases in the court of last resort, by appeal, error, or otherwise, shall not be denied."

It will be seen that under the former statute the right of review could not be claimed as a right, and even if granted as a favor and resulted in the affirmance of the judgment, the court was required to impose a penalty of five per cent upon the unsuccessful party, unless the case was within the exception named. The constitutional convention of 1875, believing that the ends of justice would be best subserved by enabling either party to a judgment who felt aggrieved thereby to have the case reviewed in the court of last resort, inserted the provision in question in the constitution. This privilege is conferred as a right; and while the unsuccessful party may, and in most cases will, be taxed with the costs of the appellate proceedings, yet it is not the policy of the law to, in effect, declare that a wrong, by the imposition of a penalty, which the fundamental law confers as a right. The motion must therefore be overruled.

MOTION OVERRULED.

APPENDIX.

RULES OF SUPREME COURT.

(In force June 6th, 1885.)

1. [SITTINGS OF COURT.]—The regular public sessions of this court for the argument of causes will open on Tuesdays, Wednesdays, Thursdays, and Fridays of each term at 8:30 o'clock A.M., and adjourn at 1 o'clock P.M., unless for special reasons the court shall, from time to time, otherwise order.

2. [MAKING UP DOCKET.]—Immediately after the time expires during which causes may be docketed for trial at a term of court, in accordance with section 584 of the civil code, the clerk shall make out and cause to be printed without delay the docket for the term. All causes from the same judicial district shall be placed together in the numerical order of the several districts, commencing with the first, and they will be taken up and heard in their order, allowing such a number of days for hearing of causes from each district as will enable the court to decide the causes and write the opinions therein from one district before hearing those from the following district. Any cause may, however, be submitted by agreement of both parties, on the records, briefs, and abstracts filed, whatever may be its place on the docket. Copies of the printed docket shall be forwarded by the clerk to each judge of the supreme and district courts and to each attorney having causes for hearing at the term.

3. [FAILURE OF PARTIES TO APPEAR.]—Whenever a cause is reached in its regular order on trial of cases, and

neither party appears in person or by attorney, the cause shall be disposed of as the court shall deem proper, according to the state and condition of the case, unless one or more of the judges of the court have participated in such cause in the court below, as judge or counsel.

4. [SUBMISSION OF CAUSES.]—Whenever a cause is regularly reached, and the plaintiff in error or appellant fails to appear, and his abstract is not on file, the defendant may have the case dismissed, or may submit it either with or without argument. When the defendant makes default, and there is due proof of service of notice having been made upon him or his attorney, and abstracts and briefs of plaintiff are on file, the plaintiff may proceed *ex parte*.

5. [CRIMINAL CASES—NO SECOND TRANSCRIPT NECESSARY.]—Whenever, in a criminal case, a writ of error shall be issued upon a certified transcript of a record, no further transcript shall be required or allowed to be taxed in the bill of costs, but the same transcript shall be returned with the writ, and shall be deemed sufficient, unless diminution or other objection thereto be suggested.

6. [TIME FOR ORAL ARGUMENTS.]—In the oral argument of a cause, the time allowed the parties on each side shall not exceed one hour, unless for special reasons the court shall extend the time.

7. [BRIEFS.]—In all cases brought into the court upon error or appeal, the plaintiff in error, or appellant, shall, at least fifteen days prior to the week in which the case shall be entered for hearing, furnish to the opposite party, or to his attorney of record, a printed copy of his brief of points and authorities relied on; and within ten days thereafter the defendant in error or appellee shall furnish the plaintiff in error, or appellant, as the case may be, a printed copy of his brief of points and authorities relied on; and each party shall, before the argument of the cause, file with the clerk of this court six copies of his brief aforesaid, one for each judge of the court and the

others for the reporter, and the party bringing the case into this court shall hold the affirmative. And in original cases, unless for cause the court shall excuse the omission, briefs must be filed by the plaintiff and defendant in the same manner as in cases on error or appeal. The briefs required by this rule shall be confined solely to the points of law made on behalf of the party filing the briefs and the authorities cited in support thereof. In citing authorities the names of parties, volume, and page of reports, or if a text-book, the page and number of the edition, must be given.

8. [ABSTRACTS OF RECORD TO BE PRINTED.]—It shall also be the duty of the plaintiff in error, or appellant, in accordance with the provisions of section 586 of the civil code, to deliver to each defendant in error, or appellee, or their attorneys of record, at least fifteen days before the first day set for the hearing of causes of the district from which such cause is brought, a printed copy of an abstract of the record, setting forth so much only as is necessary to a full understanding of the questions presented for decision. (Said abstracts to be prepared as required by rules 14 and 15). The plaintiff in error, or appellant, may, if he sees fit so to do, attach to or cause to be printed with said abstract the brief required of him by rule 7. The plaintiff in error or appellant shall also at the end of his abstract print the assignments of error which he desires to make (which in error cases must be the same as contained in the petition in error), and such assignment, while following no stated form, must be specific and definite, pointing out the very errors alleged to have been committed, and the court will only regard errors so assigned. Six copies of said abstract shall be filed with the clerk at or before the time the cause is called for hearing.

9. [SAME—ADDITIONAL ABSTRACT.]—If the attorney for the defendant in error or appellee, shall deem the abstract required by the foregoing rule to be imperfect or unfair, or so printed as not to contain matter sufficient to

give the court a full understanding of the questions presented to it for decision, he may within ten days after receiving the same deliver to the attorney for the plaintiff in error or appellant, one printed copy of such further and additional abstract as he shall deem necessary to a full understanding of the questions presented for decision, and shall likewise on or before the hearing of said cause deliver to the clerk six copies thereof.

10. [CAUSE MAY BE SUBMITTED ON PRINTED ABSTRACTS BY STIPULATION.]—In the preparation of causes for argument in this court, the parties or their attorneys may, by stipulation in writing, agree to submit the cause on printed abstracts herein provided for, and in such case it shall not be necessary to file any transcript, bill of exceptions, or copies of the record of the court below, except a transcript of the final judgment, decree, or order sought to be reversed, vacated, or modified, which transcript must be filed when the cause is docketed, and must contain, in addition to said final judgment, decree, or order, the name of the judge who tried the cause below, and the county and district from which such cause is brought.

11. [ABSTRACTS IN ORIGINAL CASES.]—The rules herein established for printing abstracts shall apply to all cases wherein the court is called on to exercise original jurisdiction, whenever testimony shall be taken by either party. In such case the plaintiff or his attorney must print and serve copy of the abstract of such testimony on the respondent or his attorney fifteen days before the hearing of the cause, and the defendant or his attorney in like manner, if he deem the abstract of relator imperfect or unfair, may within ten days thereafter print and serve upon the relator or his attorney such further abstract as he may deem necessary.

12. [SECURITY FOR COSTS.]—In each cause brought to this court the plaintiff in error, appellant, or relator, shall, before the entry of the same upon the docket, give security for costs by filing a bond in the sum of \$50, with

one or more sureties, conditioned for the payment of the costs of this court, which bond in cases brought on error or appeal must be approved by the clerk of the district court of the county from which such cause is brought, and in original cases by the clerk of this court. But this provision shall not apply in cases where a bond or undertaking has been filed in the court below, in accordance with the provisions of sections 588 and 677 of the civil code, but in such case the transcript filed, or printed abstract, must show the giving of such bond or undertaking, with the name of the sureties thereon; nor shall it apply in criminal cases where an affidavit for poverty is filed as allowed by section 508, criminal code. The party bringing the cause to this court may, if he sees fit, deposit an amount with the clerk of this court sufficient to cover the probable costs of the action, and if he do so the bond required by this rule need not be given.

13. [Costs.]—When the parties or their attorneys shall furnish their printed abstracts and briefs in conformity to the rules of this court, it shall be the duty of the clerk to tax a printer's fee at the rate of one dollar for every five hundred words embraced in a single copy of the same, against the unsuccessful party not furnishing the same, to be collected and paid to the successful party as other costs. When unnecessary costs have been made by either party, the court will, upon application, order the same taxed to the party making them, without reference to the disposition of the case.

14. [HOW ABSTRACTS, ETC., PRINTED.]—All abstracts and briefs shall be printed upon good book paper, small pica type, leaded lines; the printed page to be four inches wide and seven inches long, with a margin of two inches, but the type in which extracts are printed may be small pica solid or brevier leaded. The heading of each abstract or brief shall show the title of the cause, the term at which the cause is set for hearing, the court from which the cause is brought, and the names of counsel for both parties.

Each abstract must be accompanied with an index of its contents, and where the written transcript or bill of exceptions is filed in this court, it must show where the papers and entries therein mentioned may be found in the transcript as well as in the abstract.

15. [FORM OF ABSTRACT.]—Abstracts of records shall be made substantially in the following form :

Supreme Court of Nebraska, —Term, 18—.

John Doe	} Abstract of ———.
vs.	
Richard Roe.	

Error to (or appeal from) ——— county district court.

A. B. C. for plaintiff in error (or appellant).

D. E. F. for defendant in error (or appellee).

On the — day of ———, 18—, the plaintiff filed petition in court below, stating his cause of action to be :

(Set out only so much of petition necessary to an understanding of the questions to be reviewed, and no more. Omit all formal parts, abbreviate and condense. If there is an appearance, or no question raised about summons, return, etc., omit it).

On the — day of ———, 18—, defendant demurred and as ground thereof claimed : (State grounds. If defendant filed motion and the ruling thereon is one of the questions to be considered, set it out in the same way and continue.)

And on the — day of ———, 18—, the court ruled thereon.

(Here set out ruling; simply whether sustained or overruled. In every instance let every abstract be in chronological order of the events in the case, letting each ruling appear in the proper connection. If defendant pleaded over, and thereby waived his right to be heard from these rulings, no mention need be made of them, but continue.)

And on the — day of ———, 18—, the defendant filed his answer, setting up his defenses as follows: (Set out defense, omitting formal parts. Frame the abstract

so as to present all questions to be reviewed and raised before issue joined.)

On the — day of —, 18—, there was a trial to a jury (or the court, as the case may be) with verdict for plaintiff (or defendant). (If any question raised on verdict set it out.)

At the trial the following proceedings were had :

(Set out so much of bill of exceptions as is necessary to show the ruling of the court to which exceptions were taken and relied upon during the progress of the trial. In abstracting evidence use the narrative form, abbreviating and condensing, omitting interrogatories except such as may be necessary to a correct understanding of answers thereto, and on which error is assigned. Omit all arguments, remarks of counsel and of judge in his rulings.)

After evidence submitted and argument made, the plaintiff (or defendant, as the case may be) asked the court to instruct the jury as follows: (Set out instructions referred to in full and continue), which the court gave or (refused to give), to which rulings plaintiff (or defendant) excepted at the time. The court then charged the jury. (Set out instructions of court concisely.)

To which or to the giving of those numbered — the plaintiff (or defendant) excepted.

(Where the giving or refusing an instruction is assigned for error all instructions given must be set out.)

On the — day of — the plaintiff (or defendant) filed motion for new trial, and as ground therefor, set up, (set out grounds) which motion the court overruled, on the — day of —, 18—, to which exceptions were taken.

And on the — day of —, 18—, judgment was given: (set out substance of judgment.)

And on the — day of —, 18—, the cause was filed in the supreme court.

If supersedeas bond filed below, state the fact with amount and names of sureties.

ASSIGNMENT OF ERRORS.

And the plaintiff in error (or appellant) says there is error on the face of the record in this, (here set out the assignment of errors as they appear in the petition in error on file in the cause, or in case of appeal the errors as complained by the appellant.)

(To the abstract of each paper and entry append a reference to page of transcript on which it will be found. This will not be necessary where case is submitted on the abstract without transcript as provided in rule 10.)

This outline is presented for the purpose of indicating the character of the abstracts contemplated by these rules. No formula can be laid down applicable to all cases. The general rule to be observed is: *Preserve everything material to the questions to be decided, and omit everything else.*

16. [MOTIONS FOR REHEARING.]—A motion for a rehearing may be filed as of course at any time within forty days from the filing of the opinion of the court in the case. Such motion must specify distinctly the grounds upon which it is based, and be accompanied by a separate printed brief. If, upon examination, the court shall think such motion worthy of an answer it will so indicate, fixing a time for a hearing of the motion, of which due notice in writing shall be served upon the adverse parties, or their attorneys of record by the party making the motion.

17. [MANDATES.]—No mandate shall issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court.

18. [APPEAL CASES—NOTICE.]—In every appeal of a case in equity from a district court filed in this court, the clerk shall issue a notice to the appellee, notifying him of the filing of such appeal. The notice shall be served by the sheriff of the county from which the appeal is taken, and he shall make return of such notice within ten days after receiving the same, together with a certificate thereon

of the manner in which he served the same, and his fees for such service shall be the same as are allowed by law in similar cases, and shall be taxed in the costs of the case, unless notice shall be waived by the appellee.

19. [TRIALS IN ORIGINAL CASES.]—Whenever an issue of fact, which the law requires to be tried by a jury, shall be joined in proceedings in the nature of *quo warranto*, or *ip mandamus*, in the supreme court, the clerk shall, at the instance of either of the parties, make out a *venire facias*, directed to a bailiff of this court, commanding him to summon from the state at large sixteen jurors having the qualifications of electors, to appear before this court on the day mentioned therein, which day shall be determined by the court before the issuing of the venire. The venire shall be served and returned at least one week before the day named therein for the appearance of the jurors, and the bailiff shall attach to or incorporate in his return a list of the names of the jurors so summoned.

20. [SAME.]—Each party shall be entitled to three peremptory challenges, and challenges for cause may be made by either party, the validity of which shall be determined by the court. If, from challenges or other cause, the panel shall not be full, the court may order the bailiff to fill the same from bystanders or neighboring citizens having the qualifications of electors.

21. [SAME.]—The jurors summoned, or called as provided, or such of them as are not set aside or challenged, as will make up the number of twelve, shall constitute the jury for the trial of said issue of fact.

22. [SAME.]—Each juror shall be entitled to the same compensation and mileage as are provided by law for jurors in civil cases in the district court.

23. [SYLLABUS OF THE POINTS DECIDED.]—A syllabus of the points decided in each case shall be stated in writing by the judge assigned to prepare the opinion of the court, which shall be confined to the points of law arising from the facts of the case, which have been determined by

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24. [RECORDS NOT TO BE REMOVED.]—The clerk of the court is answerable for all records and papers belonging to his office and filed therein; and they shall not be taken from his custody unless by special order of the court, or on written consent of the attorneys of record for all the parties; but the parties may have copies when desired, by paying the clerk therefor.

25. [MANDAMUS—NOTICE.]—In all cases of application to this court for a writ of mandamus, a reasonable notice must be given to the respondent of the time when it will be made, accompanied by a copy of the affidavit on which it is based, unless for special reasons it is otherwise ordered; and except in urgent cases, the time of the hearing shall be during the week to which the causes from the district in which the respondent resides, are assigned.

26. [ADMISSION OF ATTORNEYS—FEES OF CLERK.]—In cases of the admission of attorneys to the supreme court, the clerk shall be entitled to charge and receive the following fees and no more: In case of original admission upon the report of a committee, seventy-five cents. Admission on motion, fifty cents. In addition to the above, in all cases where the attorney admitted may desire a certificate printed or engraved on parchment, the clerk may charge and receive an additional fee therefor of one dollar.

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8. Where before trial plaintiff dismisses action, defendant has right to proceed with trial and have question of right of possession of property determined; *aliter*, if action is dismissed unconditionally on motion of defendant. Qualified dismissal, with proof of right of possession in defendant, *Held*, After judgment, error without prejudice. *Moore & Cozine v. Herron* 697

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1. The language used in summons wherein the defendants are notified that unless they answer by a certain day, *Held*, Equivalent to the language of the statute, which is, that they "answer at the time stated therein," etc., and sufficient. *Hurford v. Baker* 443

Supersedeas bond, not essential for review. *Wetton v. Bel-
tators*..... 399

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1. County commissioners have no power to sell tax certificates purchased by the county, for less than the amount of taxes due thereon where the property if sold will bring the full amount of such taxes. *State, ex rel. Jones, v. Graham*... 43
2. Where decree for a lien for taxes upon two tracts of land was general as to both, and not upon each tract, *Held*, That the decree would not therefore be reversed, but apportioned on the several tracts in proportion to the amount of taxes due thereon. *O'Donohue v. Hendrix*..... 287
3. Tax deed must be valid on its face to entitle party claiming under it to benefit of special limitation of revenue law. *Housel v. Boggs*..... 94
4. Tax deed purporting to have been issued on a *private sale* must contain a recital that the land had been previously offered for sale for such taxes at public sale, and not sold for want of bidders. *Ludden v. Hansen*..... 355
5. Where purchaser at a void sale for taxes pays taxes legally levied for subsequent years, upon failure of title he will be subrogated to rights of county, to the extent of legal taxes so paid, with legal interest, even though taxes upon which sale was had were void by reason of default of assessor in not filing proper oath with assessment roll. *Merriam v. Hemple*..... 345

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1. Discrimination not allowed; telephone company is a public servant; mandamus lies to compel company to furnish instruments. *Webster Telephone Case* 126

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2. If personal examination is desired, application should be made before trial begins and experts agreed upon by the court. *Id.*..... 211

3. The question of the admissibility of evidence on ground of relevancy cannot be raised in a cause tried to a court without a jury. <i>Enyeart v. Davis</i>	228
4. Objections to admission of evidence on ground that petition fails to state a cause of action, may be taken at any time during the progress of the trial. <i>Ball v. LaClair</i> ...	39
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6. When evidence is insufficient in law to make out the case of the party who offers it, court should so instruct jury. <i>Hiatt v. Brooks</i>	34
7. Finding of court has same weight as verdict in supreme court on appeal. <i>McLaughlin v. Sandusky</i> ,.....	110
<i>Bank v. Morrison</i>	341
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2. Facts stated, and <i>Held</i> , That no misconduct of party or jury was shown which would require a new trial. <i>Johnson v. Greiss</i>	447
3. Granted under facts stated. <i>Thompson v. Sharp</i>	72
4. New trial after judgment under sec. 318, Code, on ground of misconduct, etc.; petition should state facts showing what efforts have been made to discover the misconduct, or failing to do so, facts should be stated which would excuse the making of such efforts. <i>B. & M. R. R. Co. v. Dobson</i>	450
5. Motion for, not necessary when judgment is entered on award of arbitrators. <i>Graves v. Scoville</i>	593
6. Where action is against two defendants charging them with the making and breach of a joint warranty in sale and conveyance of real estate, and evidence is sufficient as to one, but insufficient as to the other, verdict and judgment being against both, and one against whom the evidence was insufficient made no motion for new trial as to himself alone, the judgment will not be disturbed. <i>Real v. Hollister</i>	661

Trusts.

1. In case stated, *Held*, Error for the trial court to instruct

the jury that if the goods were placed in the hands of the attachment defendant to sell and account for the proceeds, and the purchaser knew or might have known of the arrangement by which the vendor had the goods, he could not hold them, the instruction failing to inform the jury that they must find that the sale was made in violation of the trust and without authority. *Shelly v. Heater*..... 505

2. Evidence to prove. *Id*..... 505

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1. The regents of the university, in the absence of an appropriation by the legislature, have no power to dispose of the endowment fund, or that derived from the $\frac{1}{4}$ mill tax. *State, ex rel. Bessey, v. Babcock*..... 610

Usury.

1. In an action on a contract where it is plead that illegal interest has been contracted for or taken or reserved, and the truth of such plea shall be proved or admitted, the defendant is entitled to recover costs. *Cattle v. Haddox*..... 307

2. Such recovery will not be confined to the costs made or incurred on question of usury, but will apply to the costs of the action. *Id*..... 307

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1. In action to recover damages for breach of contract no tender of deed is necessary. *Aliter*, where the action is to recover the contract price. *Wasson v. Palmer*..... 330

2. Measure of damages is difference between agreed price and market value of property at the time of the breach. *Id*. 330

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1. Special findings inconsistent with general verdict control it. *Ogg v. Shekan* 323

2. When the general and special verdicts of a jury are consistent with each other and are supported by sufficient evidence, the special verdict will be treated as final upon all questions directly passed upon by such verdict. *Bierbower v. Polk* 269

3. *Held*, Sustained by evidence. *Festner v. O. & S. W. E. E. Co*..... 280

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1. To constitute a water-course the size of the stream is not

material. It must, however, be a stream in fact, as distinguished from mere surface drainage occasioned by freshets or other extraordinary causes, but the flow of water need not be continuous. <i>Pyle v. Richards</i>	180
2. Where water has a definite source, as a spring, and takes a definite channel, it is a water-course, and no person through whose land it flows has a right to divert it from its natural channel so as to cause injury to another land-owner. <i>Id</i>	181
3. Although surface water may accumulate in the channel of a stream which is dry a part of each year, and greatly increase the flow of water at times, yet it will not defeat a recovery for injuries arising from the diversion of the stream whereby its water was discharged over the land of another. <i>Id</i>	182
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